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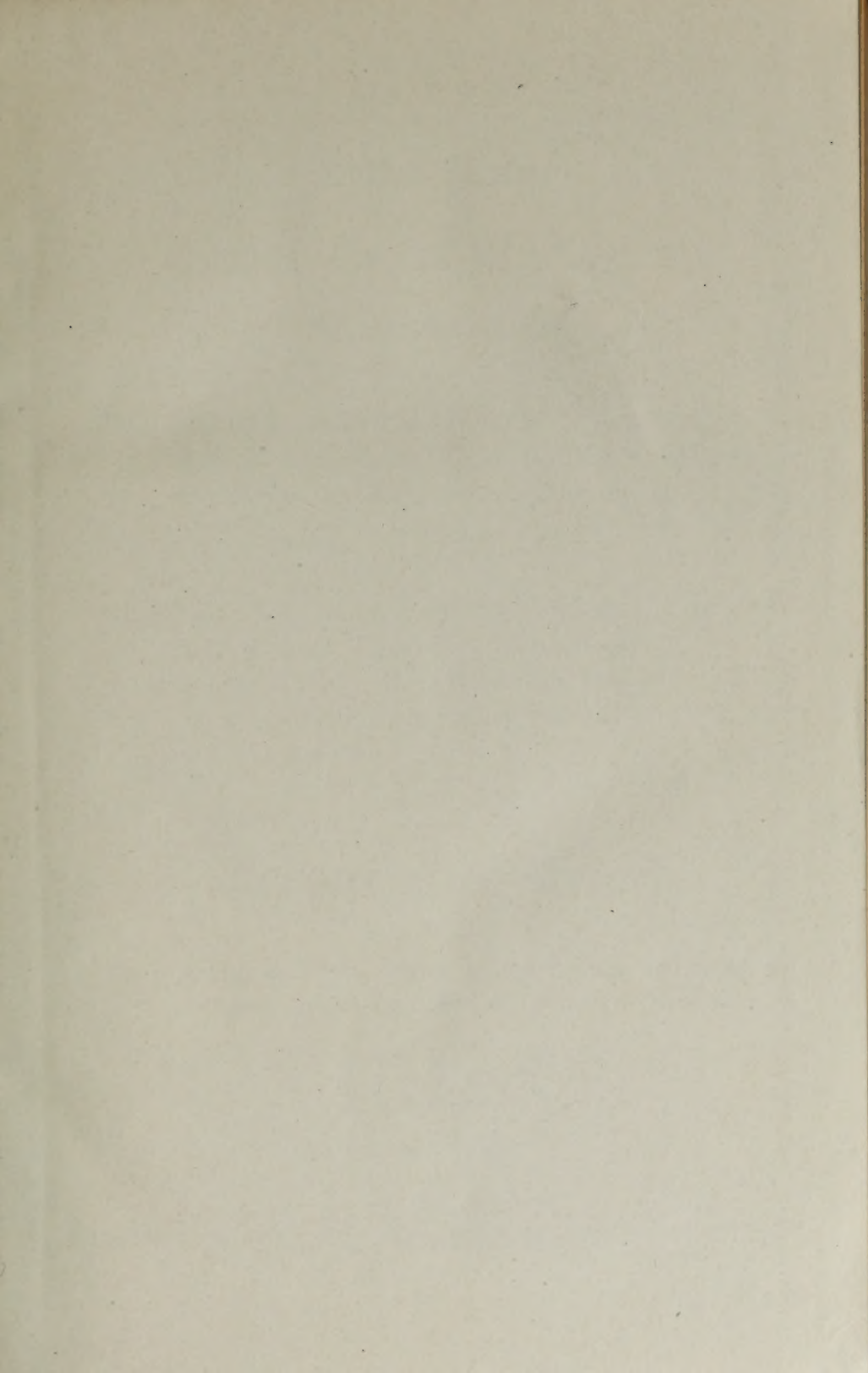


















United States  
Circuit Court of Appeals

For the Ninth Circuit.

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THE MILLER RUBBER COMPANY, a Corpora-  
tion, and THE MILLER RUBBER COM-  
PANY OF CALIFORNIA, a Corporation,  
Appellants,

vs.

CITIZENS TRUST & SAVINGS BANK, a Cor-  
poration, as Trustee in Bankruptcy of the  
Estate of W. D. NEWERF, Doing Busi-  
ness as W. D. NEWERF RUBBER COM-  
PANY, Bankrupt,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
Southern District of California, Southern Division.


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Filed

JAN 28 1916

F. D. Monckton,

Clerk



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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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THE MILLER RUBBER COMPANY, a Corporation,  
and THE MILLER RUBBER COMPANY OF CALIFORNIA, a Corporation,  
Appellants,

vs.

CITIZENS TRUST & SAVINGS BANK, a Corporation,  
as Trustee in Bankruptcy of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys [on Appeal of  
Miller Rubber Co., et al].**

[1\*] BICKSLER SMITH & PARKE, 829 Citizens' National Bank Bldg., Los Angeles, California,

Attorneys for the Miller Rubber Company,  
and the Miller Rubber Company of  
California.

W. T. CRAIG, 731 Higgins Bldg., Los Angeles, California,

NORMAN A. BAILIE, 831 Higgins Bldg., Los Angeles, California,

DAVE F. SMITH, 626 American Bank Bldg., Los Angeles California,

Attorneys for the Trustee in Bankruptcy.

---

[Original endorsed]: Filed Jan. 13, 1916. At 40 min. past 11 o'clock A. M. Wm. M. Van Dyke, Clerk. Leslie S. Colyer, Deputy.

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\*Page-number appearing at top of page of original certified Record.

*In the District Court of the United States for the  
the Southern District of California, Southern  
Division.*

THE MILLER RUBBER COMPANY, THE MIL-  
LER RUBBER COMPANY OF CALIF.,  
Corporations,

Appellant,

v.

CITIZENS TRUST and SAVINGS BANK, a  
Corporation, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as W. D. NEW-  
ERF RUBBER COMPANY, Bankrupt,  
Appellee.

**Citation on Appeal [of Miller Rubber Co. et al.,  
(Original).]**

To the Citizens Trust and Savings Bank, a Corpora-  
tion, as Trustee in Bankruptcy of the Estate of  
W. D. Newerf, Bankrupt:

You are hereby cited and admonished to be and ap-  
pear at a session of the United States Circuit Court  
of Appeals of the Ninth Circuit to be holden in the  
City of San Francisco, in the State of California, on  
the 3d day of January, 1916, pursuant to the Petition  
on Appeal and Assignments of Error filed in the  
clerk's office of the District Court of the United  
States for the Southern District of California, South-  
Division, holding terms in the city of Los Angeles, in  
said District, in the above-entitled proceeding, in  
which The Miller Rubber Company, a corporation,  
and The Miller Rubber Company of California, a cor-



poration, are petitioners and claimants, to show cause, if any there be, why the final decree and judgment rendered in such cause, confirming the order and decree of the special Master disallowing and refusing the claim and petition of said petitioners, for the reclamation of certain goods, wares and merchandise, and the other matters and things, as in said petition on appeal and assignments of error mentioned and set forth, should not be reversed, set aside and corrected; and why speedy justice should not be done to said petitioners in that behalf.

WITNESS the Honorable R. S. BEAN, United States District Judge for the Southern District of California, Southern Division, this 7th day of December, 1915.

R. S. BEAN,  
United States District Judge, Southern District of  
California, Southern Division.

[Endorsed]: No. 1972.—Bankruptcy. In the United States District Court, Southern District of California, Southern Division. The Miller Rubber Company, Appellant, v. Citizens Trust and Savings Bank, Trustee, Appellee. Citation on Appeal. Filed Dec. 7, 1915. At 30 min, past 4 o'clock P. M. By Wm. M. Van Dyke, Clerk. Murray C. White, Deputy.

Received copy this 7th day of Dec. 1915.

W. T. CRAIG,  
DAVE F. SMITH,  
NORMAN A. BAILIE,  
Attorneys for Trustee in Bankruptcy.

[2] *In the District Court of the United States,  
Southern District of California, Southern Di-  
vision.*

In re W. D. NEWERF, Bankrupt—No. 1972.

THE MILLER RUBBER COMPANY and THE  
MILLER RUBBER COMPANY OF CALI-  
FORNIA, Corporations,

Appellants,

vs.

CITIZENS TRUST AND SAVINGS BANK, a  
Corporation, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as the W. D.  
NEWERF RUBBER COMPANY, Bank-  
rupt,

Appellee.

**Stipulation for Transcript [on Appeal of Miller  
Rubber Co., et al.].**

IT IS HEREBY STIPULATED AND AGREED  
by and between the parties herein through their coun-  
sel that the record on appeal herein shall consist of  
the following papers, documents and testimony, and  
none other, and that the clerk in preparing said rec-  
ord, shall omit all captions and verifications.

1. This stipulation for transcript of record on ap-  
peal.
2. Stipulation consenting both appeals in one rec-  
ord.
3. Appellants' amended petition for reclamation,  
excluding schedules of first petition.

4. Answer to petition, it being stipulated that all new matter in the amended petition is deemed denied.
5. Order referring controversy to Special Master.
6. Order of Special Master approving bond.
7. Order of Special Master for delivery of property.
8. Testimony transcribed, and letters copied and attached.
9. Special Master's report in full, except price list [3] of Gibraltar tires and price list of Miller tires, and excepting exhibit "B" consisting of two typewritten pages, including contract of 1911 and 1914.
10. Order of Reference in Bankruptcy.
11. Notice to take depositions served July 6th, 1914.
12. Affidavit of W. C. Smith in re depositions.
13. Affidavit of C. R. Wetsel in re depositions.
14. Affidavit of Norman A. Bailie in re depositions.
15. Exceptions to Special Master's report.
16. Judgment of District Court and correction of same.
17. Petition on appeal.
18. Bond on Appeal.
19. Order granting appeal and fixing bond.
20. Citation on appeal.
21. Appellants' objections and assignment of error.
22. Notice of motion to receive depositions in evidence.
23. Order extending time to file transcript.
24. Order allowing transcript on appeal.



25. Certificate of clerk of United States District Court to transcript of record.

IT IS FURTHER STIPULATED that the petition in bankruptcy against said W. D. Newerf was filed March 19th, 1915, and that he was adjudged bankrupt on April 9th, 1915; and that the petition, amended petition of appellants herein, and all other proceedings herein, were filed and had in said bankruptcy of said W. D. Newerf.

Dated at Los Angeles, California, this 5th day of January, 1916.

BICKSLER, SMITH & PARKE,  
Attorneys for The Miller Rubber Company.  
THE MILLER RUBBER COMPANY OF  
CALIF.,

Petitioners.

W. T. CRAIG,  
DAVE F. SMITH,  
NORMAN A. BAILIE,  
Attorneys for Trustee in Bankruptcy.

[**Stipulation that Record on Appeal of Miller Rubber Co. et al. may be Used as Record on Appeal of Citizens Trust & Savings Bank.**]

[4] *In the District Court of the United States, Southern District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellant,

vs.

MILLER RUBBER COMPANY, and MILLER RUBBER COMPANY OF CALIFORNIA, Corporations,

Appellees.

**STIPULATION IN RE TRANSCRIPT.**

IT IS HEREBY STIPULATED and agreed by and between appellant and appellees in the above-entitled appeal, by their respective counsel, that the transcript on the appeal of Miller Rubber Company, a corporation, and the Miller Rubber Company of California, a corporation, Appellants, against Citizens Trust & Savings Bank, a corporation, as trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, Appellee, may be used and serve as and for the transcript on this appeal to the same purpose and with the same effect as if a separate transcript had been filed in this appeal.

Dated December 31, 1915.

W. T. CRAIG,  
DAVE F. SMITH,  
NORMAN A. BAILIE,  
Attorneys for Appellees.

BICKSLER, SMITH & PARKE,  
Attorneys for Appellees. [4]

[5] (Caption.)

**Amended Petition.**

By leave of Court first had and obtained the petitioners herein file their amended petition herein and allege as follows:

**FIRST CAUSE OF ACTION.**

**I.**

The Miller Rubber Company is a corporation organized and existing under the laws of the State of Ohio and a citizen of said State.

**II.**

That the Miller Rubber Company of California is a corporation organized under the laws of the State of California with its principal place of business in the city of San Francisco, California.

**III.**

Your petitioner the Miller Rubber Company represents to the Court that heretofore, to wit, on the 20th day of March, 1915, this Court appointed the Citizens Trust & Savings Bank as receiver of the property of one, W. D. Newerf, trading as the W. D. Newerf Rubber Company. That heretofore, between the 1st day of June, 1914, and the 17th day of March, 1915, both dates inclusive, your petitioner consigned to the Miller Rubber Company of California, W. D.



Newerf, Agent, certain casings, tubes, and tire accessories, of the approximate value of several hundred thousand dollars; that a portion of said goods are now in the possession of said receiver as follows: In the city of Los Angeles, certain goods as described in schedule "A" attached to the original petition herein, to which reference is hereby specially made, and which said schedule is hereby adopted, of the aggregate value of \$32,101.95; in the city of San Bernardino certain goods as described in schedule "B" attached to the original petition herein, to which reference is hereby specially made, and which said schedule is hereby adopted, of the aggregate value of \$2,854.00; [6] in the city of San Francisco, certain goods as described in schedule "C" attached to the original petition herein, to which reference is hereby specially made, and which said schedule is hereby adopted, of the aggregate value of \$17,277.05; total valuation of \$52,233.

#### IV.

Your petitioner further shows that in connection with said transactions as aforesaid, your petitioner installed in the places of business at Los Angeles and San Francisco, sets of books of account, consisting of sales-book, ledger, collection reports, sales, order blanks, invoice blanks, letter-heads, envelopes, and other necessary books and papers, belonging to the conduct of said business; that all of said books and papers were paid for by your petitioner and belong to your petitioner. That demand has been made upon the receiver to release and surrender to your petitioner all of said property and that said demand has been refused.

## V.

Your petitioner further shows that it is the unqualified and absolute owner of said property; that the same does not belong to W. D. Newerf, trading and doing business as W. D. Newerf Rubber Company, but that the ownership of said property is as last aforesaid, and not otherwise.

## SECOND CAUSE OF ACTION.

Your petitioners hereby adopt all of the facts and allegations in their first cause of action herein, excepting paragraph V, beginning at line 30, page 2, to and including line 3, page 3, and make the same a part hereof as though fully and entirely set forth at length, and for a second cause of action allege:

## VI.

Your petitioner The Miller Rubber Company of California, a corporation, represents to the Court that each and all of said goods as herein referred to in the first cause of action and in schedules "A," "B" and "C," attached to the original petition, [7] and which are hereby adopted, were shipped by The Miller Rubber Company, a corporation of Ohio, and delivered to your petitioner The Miller Rubber Company of California, a corporation. That possession only is vested in and to your petitioner by said Miller Rubber Company of Ohio with the right of, and for the purpose of the sale of said goods, and the appointing of such agents for the sale of said goods, and that upon the sale of any and all of said described goods, the money so received was to be and was deposited in bank in the city of Los Angeles subject to the order of, and the check of The Miller Rubber

Company of California for the use of The Miller Rubber Company of Ohio only.

VII.

That your petitioner was at all times in the lawful and rightful possession of each and all of the goods described in schedules "A," "B" and "C," as aforesaid, until dispossessed thereof by the receiver herein.

VIII.

That under a written contract dated on or about June 11th, 1914, your petitioner constituted and appointed W. D. Newerf, trading and doing business as the W. D. Newerf Rubber Company, its subagent for the sole purpose of selling said goods upon commission upon the terms as set forth in said contract, and in no other way, and that no sale or deliveray of any of said goods described in schedules "A," "B" and "C" aforesaid, was made to the said W. D. Newerf by your petitioner.

IX.

Your petitioner further represents that under said contract of June 11th, 1914, and since said date, goods were sold by your petitioner's subagent, W. D. Newerf, and delivered to customers by the Miller Rubber Company of California, the accounts receivable for said goods being fully and completely set forth in the books of account of your petitioner opened and kept installed, as more fully set forth in the first cause of action [8] herein, and that said accounts receivable, and said books, are in the possession of the receiver herein.

X.

That the property and ownership of said accounts



receivable shown as aforesaid, and the money due thereon, was at all times herein alleged, and now is the property of The Miller Rubber Company of California, and said company is entitled to the immediate possession of said books so installed as aforesaid, and the right to collect each and all of the accounts so represented as aforesaid, all of which are now detained and held by the receiver herein, and to your petitioner's great and irreparable disadvantage and loss.

WHEREFORE, (a) your petitioner The Miller Rubber Company of Ohio prays for an order of this Court directing and requiring the Citizens Trust & Savings Bank, receiver herein, to immediately deliver the aforesaid described property to it.

(b) Your petitioner The Miller Rubber Company of California prays for an order of this Court directing and requiring the Citizens' Trust & Savings Bank, receiver herein, to immediately deliver the aforesaid described property to it.

(c) Your petitioner The Miller Rubber Company of California prays for an order directing the Citizens Trust & Savings Bank, receiver herein, to immediately deliver to it each and all of the books of account so installed as aforesaid, and each and all of the accounts and bills receivable of your petitioner as and for its own property.

BICKSLER & SMITH,  
Attorneys for Miller Rubber Co. and Attorneys for  
Miller Rubber Co. of California, Petitioners.

Filed March 31st, 1915, at — min. past 4 P. M.

LYNN HELM,  
Referee.  
C. MEADE,  
Clerk.

[9] United States of America,  
Southern District of California,  
Southern Division,  
County of Los Angeles,—ss

C. R. Wetsel, being by me first duly sworn, on oath says: That he is the credit manager of Miller Rubber Company, a corporation, of Akron, Ohio, petitioner herein, and that he is duly authorized in the premises; that he is the duly authorized, constituted and appointed agent of the Miller Rubber Company of California, a corporation, and duly authorized in the premises; that he has personally made the investigation of the facts set forth in said petition and is more familiar with them than any of the other officers of said petitioners; that the statements and allegations contained in the foregoing petition are true.

C. R. WETSEL.

Subscribed and sworn to before me this 30 day of March, 1915.

[Seal] W. C. SMITH,  
Notary Public, in and for the County of Los Angeles,  
State of California.

[10] (Caption.)

**Answer of Citizens Trust & Savings Bank, Receiver  
To the Petition of Miller Rubber Company.**

Comes now the Citizens Trust & Savings Bank, Receiver in Bankruptcy of the estate of William D. Newerf, Bankrupt, and answering the petition of Miller Rubber Company on file herein, admits, denies and alleges as follows:

I.

Said receiver has no information and belief sufficient to enable it to answer the first allegation in said petition, and basing its denial on that ground, denies that the Miller Ruber Company is a corporation organized or existing under the laws of the State of Ohio.

II.

Said receiver has no information sufficient to enable it to answer the allegations contained in that part of said petition beginning at line 19 on page 1 thereof, and ending on line 1 of page 2 thereof, and basing its denial on that ground, said receiver denies that between the 1st day of June, 1914, and the 17th day of March, 1915, or at any time or at all, said petitioner consigned to the Miller Rubber Company of California, W. D. Newerf, agent, any casings or tubes or tire accessories, either of the approximate value of several hundred thousand dollars or of any value whatsoever; denies that any portion of said consigned casings are in the possession of said receiver, either in the city of Los Angeles, or San Bernardino, or San Francisco, either as described in schedule "A," or schedule "B," or schedule "C," or other-

wise; denies that any consigned goods of the Miller Rubber Company in the hands of said receiver amount to the sum of Fifty-two Thousand Two Hundred Thirty-three Dollars (\$52,233), or any other sum, or any sum whatsoever.

### III.

Answering that portion of said petition commencing on line [11] 2 and ending on line 10 of page of said petition, said receiver alleges that it has no information or belief sufficient to enable it to answer the allegations therein contained, and basing its denial on that ground said receiver denies that in connection with said alleged transactions, or otherwise, or at all, said petitioner installed at any place of business in Los Angeles or San Francisco books of account as described in said petition, or collection reports, or sale order blanks, or invoice blanks, or letter-heads or envelopes, or any other books or papers belonging to the conduct of said business; denies that any of said books or papers, or any books or papers now in the possession of said receiver were paid for by said petitioner or belong to said petitioner.

### IV.

Said receiver denies that demand has been made upon it to release or surrender to said petitioner any part of said property.

### V.

Answering that part of said petition commencing on line 14 page 2 thereof and ending on line 19 page 2 thereof, said receiver denies on information and belief that said petitioner is the unqualified or absolute owner of said property or any thereof; denies



that said property and the whole thereof does not belong to William D. Newerf, but said receiver alleges on its information and belief that all of the property described in said petition and in the exhibits attached thereto, together with all books of account referred to in said petition and all stationery, letter-heads, etc; are the property of said bankrupt and are rightfully in the possession of said receiver.

WHEREFORE, said receiver prays that said petition may be denied, and that an order may be made and entered herein decreeing that all the property of every kind or nature described in said petition and in the exhibits attached thereto is the property of said William D. Newerf, Bankrupt.

[12]

CITIZENS TRUST & SAVINGS BANK.

By MARK S. SLOSSON,

Trust Officer.

Receiver.

Filed March 27, 1915, at ——— past 11 A. M.

LYNN HELM,

Referee,

C. MEADE,

Clerk.

W. T. CRAIG,

DAVE F. SMITH,

NORMAN A. BAILIE,

Attorneys for Receiver.

United States of America,  
Southern District of California, Southern Division,  
County of Los Angeles,—ss.

Mark S. Slosson, being duly sworn, says: That he is the trust officer of the Citizens Trust & Savings Bank, receiver herein, and that he verifies this answer for and on behalf of said receiver, in the foregoing entitled proceeding; that he has read the foregoing answer of Citizens Trust & Savings Bank, Receiver, to the petition of Miller Rubber Company and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes to be true.

MARK H. SLOSSON.

Subscribed and sworn to before me this 27th day of March, A D. 1915.

[Seal]

J. A. GALVIN,

Notary Public in and for the County of Los Angeles,  
State of California.

---

**[Order Referring Matter to Special Master.]**

**[13] MINUTE ORDER.**

At a stated term, to wit, the January term, A. D. 1915, of the District Court of the United States of America, in and for the Southern Division, held at the courtroom thereof in the city of Los Angeles, on Tuesday, the 23d day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Hon. OSCAR A. TRIPPET, District Judge.

No. 1972—BKCY. S. D.

In the Matter of W. D. NEWERF, Bankrupt.

This matter coming to be heard on the petition of the Miller Rubber Company for the delivery of certain property W. S. Bicksler Esq., appearing as counsel for the petitioner; Carroll Allen Esq., appearing as counsel on behalf of the petitioning creditors it is on the Court's own motion ordered that this matter be, and the same hereby is, referred to Lynn Helm, Esq., as Special Master to hear and determine the issues raised by said petition and such answer as may be filed in reply thereto and to report his findings of fact and conclusions of law to the Court.

[14] (Caption.)

**Order Approving Bond, etc.**

The Miller Rubber Company of California, having filed a bond in the sum of \$20,000 with the American Surety Company of New York, as surety, conditioned as provided in the order entered herein on the 6th day of April, 1915.

It is ORDERED that said bond and the same is hereby approved, and

IT IS ORDERED that the receiver comply in all respects with the order of April 6, 1915.

LINN HELM,

Referee in Bankruptcy, Special Master.

April 7, 1915.

[15] (Caption.)

**Order [of Referee in Bankruptcy] on Petition of  
Miller Rubber Company.**

This cause coming on to be heard upon the order heretofore entered in said court on the 29th day of March, 1915, appointing Lynn Helm, Referee in Bankruptcy, Special Master, to hear the petition of the Miller Rubber Company of Ohio, to reclaim certain goods in the possession of the receiver herein, and an answer having been filed by the receiver, Messrs. Bicksler & Smith appearing for the Miller Rubber Company of Ohio, and Norman Bailey, Esq., Dave F. Smith, Esq., and W. T. Craig, Esq., appearing for the receiver, upon motion of the Miller Rubber Company of Ohio leave is given to file an amended petition joining in said petition the Miller Rubber Company of California, as petitioner, with the Miller Rubber Company of Ohio, the answer of the receiver heretofore filed to the petition of the Miller Rubber Company of Ohio, to stand as an answer to this amended petition, all matters not therein admitted to be considered denied.

And thereupon, the Court having partially heard the evidence offered on behalf of the petitioners, and it appearing that the hearing hereon could not be concluded at the present time because of the necessity of taking an account of all transactions between the Miller Rubber Company of Ohio and said bankrupt, and the Miller Rubber Company of California and said bankrupt, but that it was desirable that the goods sought to be reclaimed should be, if possible,



delivered to the petitioners, the Miller Rubber Company of California, subject to certain conditions, the Court having heard the argument of counsel and being fully advised in the premises finds from the testimony and the exhibits that have heretofore been offered herein that a contract was entered into between W. D. Newerf and the Miller Rubber Company of Ohio in November, 1911, which may be known as a consignment contract, under which goods were consigned [16] or sold, as may hereafter be determined, by the Miller Rubber Company of California, to Newerf. Subsequently, a contract was entered into between W. D. Newerf and the Miller Rubber Company of California, which is dated June 11, 1914, but was entered into some time subsequent to the 28th day of August, 1914, by which the Miller Rubber Company of California appointed W. D. Newerf as its agent to sell, in certain territory therein described upon a commission basis, the matters under the contract relating to the date as of July 1, 1914.

Newerf was indebted to the Miller Rubber Company of Ohio, under the contract of November, 1911, and had given notes for such indebtedness; he also, on the first of July, had a stock on hand held under the contract of November, 1911. Subsequent to July 1, 1911, Newerf, as agent of the Miller Rubber Company of California, sold goods from which he was entitled to commission according to the contract dated June 11, 1914. These commissions were, by specific authority of Newerf given about November 16, 1914, applied upon the indebtedness of Newerf to

the Miller Rubber Company of Ohio; since then, the application, if any, has been made without Newerf's consent.

A dispute has arisen between the Miller Rubber Company of California and Newerf as to the amount of the commissions which Newerf should be entitled to, and according to the theory of the auditor of the Miller Company of California, they should not exceed \$12,217.84. On the other hand, Mr. Newerf claims that they should be from eighteen to twenty thousand dollars. It is necessary that an accounting should be taken between the California Company and W. D. Newerf, agent, as to the amount of stock on hand, and the amount of commissions due Newerf, either on account of goods sold and stock for which collections have been made, or goods sold for which remittances are still due. It is therefore ordered that an accounting be taken by the Mushet Audit Company, and these accounts as shown by the books of the Miller [17] Rubber Company of California, kept by W. D. Newerf, Agent. The auditor will take the statements of Mr. Wetsel, the auditor of the Miller Rubber Company of California, and also the statement of Mr. Newerf and Mr. Roe, the bookkeeper of the W. D. Newerf Company as to their methods of making their respective accounts. If they disagree, the auditor will report the several amounts that the accounts may show upon either theory, either that of Mr. Wetzels or that of Mr. Newerf, or his bookkeeper. The audit company will make a complete audit of the books and as soon as the audit is completed will turn the same over to the

Miller Rubber Company of California, but said books to remain in this jurisdiction until the further order of this Court.

An invoice will be taken of goods on hand, received since July 1, 1914, by W. D. Newerf, Agent, from the Miller Rubber Company of California, and they, and all uncollected accounts will be turned over to the Miller Rubber Company of California, upon the Miller Rubber Company of California executing a bond to the receiver in this case in the penal sum of twenty thousand dollars, conditioned that the Miller Rubber Company of California, will, on the termination of the accounting, pay to the receiver or trustee, any moneys that may be found due from the Miller Rubber Company of California to W. D. Newerf, Agent, on account of the commissions on goods consigned to him from the Miller Rubber Company of California. And further conditioned for the payment on demand of such portion of any commissions that may be due W. D. Newerf, or W. D. Newerf, bankrupt, on account of collections from sales of said goods heretofore consigned by the Miller Rubber Company of California to W. D. Newerf, Agent, whether upon subconsigned goods, or goods actually sold, as such collections may be made by the Miller Rubber Company of California; and upon agreement of the petitioner in this case, the Miller Rubber Company of California and the Miller Rubber Company of Ohio, to pay any costs that may be ultimately awarded against them.

[18] If a bond is not given in accordance with this order, the goods on hand will remain until the

final determination of the audit. The audit company shall allow the representative of the Miller Rubber Company of California access to the books at all times, not interfering with said audit.

An account shall also be taken by the audit company of all goods consigned by the Miller Rubber Company of Ohio to W. D. Newerf prior to July 1, 1914, and on hand at that date, and in the sale of said goods on hand July 1, 1914, and on hand and held by the receiver or trustee, a separate account of the sales thereof shall be kept. The fund derived therefrom to be subject to the final determination of this court as to whether the same belongs to W. D. Newerf, bankrupt, or the Miller Rubber Company of Ohio, and any collections of back accounts from sales made of consigned goods last aforesaid, shall be kept separate and distinct from collections from other goods of said bankrupt.

The audit company will also report separately and distinctly in reference to the accessories consigned under the contract of June 11, 1914, and as to the method in which they were handled by the California Company and W. D. Newerf, agent.

The bonding company must agree that if the money is not paid by the Miller Rubber Company of California within thirty (30) days after the final award shall be made against the rubber company, that a judgment may be entered for that amount against the bonding company.

AND IT IS FURTHER ORDERED that the hearing on said petitions shall be continued until the



coming in of said account.

LYNN HELM,  
Referee in Bankruptcy.

April 6, 1915.

**CERTIFICATE ATTACHED.**

United States of America,  
Southern District of California,  
Southern Division,—ss.

I, Lynn Helm, Referee in Bankruptcy, in and for the county [19] of Los Angeles, State of California, in and for said district, do hereby certify that the foregoing is a true and perfect copy of order approving bond and order on petition of Miller Rubber Company, in re W. D. Newerf, Bankrupt, in the above-entitled matter as the same appears of record in the proceedings in said matter now on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand this 7th day of April, 1915.

LYNN HELM,  
Referee in Bankruptcy and Special Master.

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**[Testimony of W. D. Newerf.]**

[20] W. D. NEWERF testified as follows:

“I first commenced to do business with The Miller Rubber Company about November, 1911, as I remember it, in the capacity of agent for their tire line. I had an agreement with The Miller Rubber Company dated November 6th, 1911.

I made a subsequent contract dated June 11th, 1914, with The Miller Rubber Company of Califor-

nia, which is part of the record, and which bears my signature.

Q. At the time this contract was entered into did you have on hand any goods consigned under the other contract to which you refer as having been executed in 1911—any of the goods of The Miller Rubber Company?

Mr. BAILIE.—That is objected to as calling for an opinion and moreover it assumes a fact not in evidence because it assumes that that contract was actually entered into, and that it binds the parties hereto; this alleged contract which Mr. Newerf has in his hand, that is, Petitioner's Exhibit "A," or whatever it is, is not a contract.

SPECIAL MASTER.—I understand the point but the question practically is this: Prior to the 11th day of June, not with reference to any contract at all, but prior to the 11th day of June, did they have any goods in their hands that were consigned to them pursuant to the contract of November 6th, 1911?

Mr. BAILIE.—You use the word consigned in its general meaning?

SPECIAL MASTER.—Yes, as under that contract.

Mr. BICKSLER.—Under that contract?

Ans. Yes, sir.

[21] "All of the goods received were billed in this manner, The Miller Rubber Company of California, although it came from Akron, Ohio. I didn't, that I know of, receive any goods in any other way except as shown by this statement."

Referring to paragraph VII of the contract of No-

vember 6th, 1911, said paragraph quoted in the question reads as follows:

“When desired by second party, four months’ notes drawing interest at 5% will be accepted by first parties in settlement for all purchases made by second party from first parties, provided, however, that the total maximum of such notes shall not exceed Twenty-five Thousand Dollars (\$25,000) at any one time during the first year of this contract, and that such maximum after the first year is to be subject to mutual agreement of both parties, but not less than Twenty-five Thousand Dollars (\$25,000) unless credit of second party becomes impaired.”

Q. Now, please state to the Court whether any notes were made or given, and what, if anything, was done in that connection between you and The Miller Rubber Company of California.

Ans. There were notes and cash given in settlement of the billing of The Miller Rubber Company to the Newerf Company.

The custom was to check the amount of goods sold.

Goods were sold during the month to various customers, and the amount was figured at the end of the month, and a statement was sent to The Miller Rubber Company for the Miller goods, and the sales were made from the consigned stock of The Miller Rubber Company.

I first had a consultation with Mr. Wetsel representing The Miller Rubber Company of California, with reference to entering into a new contract, I

would say in the forepart of June, 1914, representing, as I understand, The Miller Rubber Company of California and The Miller Rubber Company, of Ohio.

[22] I understood him to be the credit man of The Miller Rubber Company of Ohio.

I dealt with him then as a man representing The Miller Rubber Company, of Ohio.

I understand that The Miller Rubber Company, of Ohio, had established this as a corporation known as The Miller Rubber Company of California for the purpose, possibly, of being used, or of using it to facilitate their business as a California corporation.

It was to be under the laws of the State was the reason for it.

Mr. Wetsel explained to me that so far as being a separate corporation it was just the same corporation. Only organized in that way to comply with the laws of this State.

Referring to letter of August 13th, 1914, which is part of the record, it was not written to The Miller Rubber Company of California because we understood we were dealing with The Miller Rubber Company, of Akron, Ohio.

I figured that this new way of carrying my account would enable me to get more goods, that is one reason.

I received invoices of the goods from The Miller Rubber Company, of Ohio, marked Miller Rubber Company of California, since the first of July, 1914. Prior to that date they were not, to my knowledge, so marked. After that date they began to be



marked Miller Rubber Company of California. After that date I made no change in my system of books. I still kept my stock cards just the same. On the 1st of August, 1914, I put in a new system entirely, a shorter system, but it was carried on in the same way as it had been heretofore. The cards show the casings and tubes on hand the first of July, 1914, and as new goods came in they were put on the cards as they came in.

[23] The invoices came from Akron, Ohio.

The invoices were marked "The Miller Rubber Company of California," but they came from Akron, Ohio.

Referring to the statement on the stock card above referred to it contains the words "Consigned to W. D. Newerf Rubber Company, Los Angeles."

Referring to the contract of November 6th, 1911, I never gave to The Miller Rubber Company, of Ohio, a ninety days' notice of my election to terminate that contract. I never received from either The Miller Rubber Company, of Ohio, or the Prudential Rubber Company, a like notice of the termination of said contract.

I had full charge of selling the Miller goods in my store. There was no representative of The Miller Rubber Company of California in my establishment, and there was no representative of The Miller Rubber Company, of Ohio, in my establishment. All of the employees in my establishment were on my payroll and on nobody else's payroll.

I did not consult The Miller Rubber Company of California, or The Miller Rubber Company, of Ohio,

with regard to extending credit, or what credit I should extend.

If I wanted to subconsign goods I subconsigned them.

There was a new arrangement entered into July 1st, 1914, when I opened up a separate set of books in my office to keep track of the Miller goods, to wit, the contract dated June 11th, 1914, and its supplement.

I had no sign in my store to indicate to the general public that anything there was the property of The Miller Rubber Company of California.

[24] I never owed The Miller Rubber Company of California any money, not to my knowledge. (Objected to as incompetent, irrelevant and immaterial.)

We entered into a new arrangement with The Miller Rubber Company of California as of July 1st, 1914, and earned commissions from that date on. Prior to that date we were dealing directly with The Miller Rubber Company, of Akron, Ohio, and did owe them for goods purchased. (Objected to as calling for a conclusion of the witness.)

The Miller Rubber Company of California has never paid me any money on account of commissions.

My interpretation of the contract with The Miller Rubber Company of California was to the effect that the computation of the compensation was to be, at the time of the contract being made, 10—12½—12½—5% from the list attached to the contract, and that the difference between the sale price of a tire or

tube and those figures, was to be our compensation, and our conclusion of the sale price was the face of the invoice. If a tire is sold at \$20.00, it is 10—12½—12½—5% from the list price, or from the price list attached to the contract. Our compensation should be the difference between the original price stipulated in the contract, and the face of the invoice. The 5% appearing on the invoice as terms was a matter, we concluded, of The Miller Rubber Company's making, and that that was simply an inducement for the customer to pay the cash on that invoice at a stipulated time, and should not enter into our compensation.

The forms of invoices were furnished by The Miller Rubber Company of California.

There was no reference to the 5% except in the place on the invoice where it said terms. It said 5% 10th Prox. We considered that that was allowed by The Miller Rubber Company of California.

[25] There was a period of time that there was no objections made by The Miller Rubber Company to our method of figuring, and I was then figuring as I have indicated on a sale for \$100. (Objection sustained by Special Master and answered subject to the objection.) It was understood between The Miller Rubber Company and ourselves that when a tire was sold at list price, the customer's list, and billed in that manner, there was no 5% allowed. It was also understood that when a tire was sold at the dealer's list price the 5% would be allowed. That was proven by the acceptance of the invoices by The Miller Rubber Company."

(Move to strike out, is not responsive to any question, incompetent, irrelevant and immaterial, and a conclusion of the witness. Special Master ruled he would sustain subject to the motion.)

[26] The following night letter was introduced:

[**Exhibit—Night Letter, September 10, 1914, W. D.**

**Newerf Rubber Co. to Miller Rubber Co.]**

Letter-head Western Union Telegraph Company.

**NIGHT LETTER.**

Los Angeles, Cal., 9-10-14.

The Miller Rubber Company,

Akron, Ohio.

Replying to Wetsel letter fifth, reference note due fifteenth, we have made superhuman efforts trying every possible means to raise funds to meet this, but Coast financial conditions are such that it is beyond our power to raise money immediately. We are endeavoring to raise money and have application now under advertisement. Clear judgment on your part should show your only course is to credit note with approximately six thousand dollars which our books show July and August commissions to be, and renew balance for ninety days, giving us a chance to raise money. Wire back these instructions as we positively cannot pay note any other way. Your intimation of bringing matters to a climax might raise more havoc than you can cenceive.

**W. D. NEWERF RUBBER COMPANY.**

[27] The following telegram was introduced:



[**Exhibit—Day Letter, November 12, 1914, W. D. Newerf Rubber Co. to Miller Rubber Co.**]

Letter-head Western Union Telegraph Company.

DAY LETTER.

Los Angeles, 11-12-14.

The Miller Rubber Company,  
Akron, Ohio.

New notes mailed per your request. Agreable to apply our commissions on open account. Return to us all notes for which we have sent renewals. Writing.

W .D. NEWERF RUBBER CO.

[**Testimony of John F. Roe.**]

[**28**] JOHN F. ROE, bookkeeper for W. D. Newerf Rubber Company testified as follows:

Newerf Rubber Company had one store situated at the corner of Pico and Hope Streets, Los Angeles. It was divided into three rooms.

It was all occupied by the Newerf Rubber Company.

In these three apartments were kept tires and accessories. They were kept in different departments. The corner room was the salesroom. Adjoining that on the Hope Street side was the tire room, and adjoining the salesroom on the Pico Street side was the stock and shipping room.

In the tire room there were tires and some other goods, accessories, mainly tires.

The tires were impressed with the name of The Miller Rubber Company, and the size and description and serial number of the tires.

There were no signs hanging up in the room where the Miller goods were stored to indicate that they were the property of The Miller Rubber Company, of Ohio, or The Miller Rubber Company of California, but there was a tag on the tires showing the grade of tires, the serial number, the size and the style of the goods. It said something about The Miller Rubber Company. I could not tell you off-hand just what the wording on that tag was.

The tire room, aside from the fact that it had tires stored in it did not differ in any way from the other rooms of the store. One room was a sales-room, and the other room was a shipping room, and the other room had tires [29] and accessories about it, that is all there was to it.

A stranger coming into the room, or coming into the store, could not distinguish part of the stock from the other except that part was tires and accessories, and the other part was the shipping room.

No stranger coming in would notice any difference. There was nothing to indicate that the goods belonged to anybody except the W. D. Newerf Rubber Company.

**[Testimony of Charles R. Wetsel.]**

[30] CHARLES R. WETSEL, Credit Manager of The Miller Rubber Company of California, testified as follows:

The California corporation (The Miller Rubber Company of California) was not devised as a profit making corporation. It was devised specially for the purpose of complying with the Statute of the

(Testimony of W. D. Newerf.)

State of California, as I understand it.

In reference to certain notes executed by W. D. Newerf Rubber Company in favor of The Miller Rubber Company, of Akron, Ohio, amounting to \$26,561.62. These notes represent the indebtedness which was owing to The Miller Rubber Company, of Ohio, by the W. D. Newerf Rubber Company prior to July 1st, 1914, or renewals of other notes which we had.

They were renewed as of the date shown by the note.

They were renewals of other notes.

There were certain notes given to cover the indebtedness from month to month, and as those notes fell due in October, November and December, certain renewals were offered.

The accessories were never charged direct to the customers by Mr. Newerf on the books of The Miller Rubber Company of California, the way the tires and tubes were. The goods were sold out of consigned stock and there were so many small items to keep reporting for a small portion of the business anyway, and Newerf did not want to hire what he considered would be an additional clerical force to run the business and take the stuff out under the name of The Miller Rubber Company of California, so of his own accord he takes and keeps the records of these sales, and I do not know how [31] he charged them. I assume he charged them, takes all of the stuff out of our consigned stock regardless of our directions, and makes a list of those sold at the

(Testimony of W. D. Newerf.)

end of the month and charges it to us on our stationery.

We take the figures which are furnished The Miller Rubber Company by Newerf and compute the commissions on those figures, the commissions being the actual difference between the actual selling price for which Newerf sold our goods, and the prices that are contained in the contract. If Mr. Newerf sells \$100 worth of goods, so far as trade discount goes we allow 5% off for cash, he giving the purchaser the option of paying the bill within a certain specified period and deducting the 5% cash. Mr. Newerf's contract is such that he would only be entitled to a compensation which is the difference between the actual selling price and the figure named in the contract. The actual selling price is \$100 less the 5%, so that it is \$95 that is used as the actual selling price instead of \$100. Those invoices are billed by Newerf himself on that basis. We take off the 10—12½—12½—5% off the list price.

The 10—12½—12½—5% is figured off that list price and the difference between the 10—12½—12½—5% from the list represents Newerf's compensation for handling the goods, then he would actually only get \$95 for the goods. Suppose you go to Newerf to buy a tire. He knows your credit is good and renders you a bill for \$100 worth of tires, but he gives you terms of 5% tenth prox., which means that the actual selling price of the goods is \$95. Then he sends a copy of that invoice in to The Miller Rubber Company and [32] The Miller Rubber Company



(Testimony of W. D. Newerf.)

take that copy of the invoice and they determine the basic price, 10—12½—12½—5% off \$100, is a certain amount, and deducting that certain amount from this \$95 is what he gets for his commission.

The main purpose of giving the 5% is to aid in the collection of accounts to get the money in quicker, and that is the only reason that the 5% is given, to get the collections in.

It is optional with the agent as to what he sells goods for. He does not even have to use our list. He could charge twice the prices if he wanted to. He is not to make the price below a certain point, and he can sell for as much in excess of that as he desires. That means that he cannot go below 10—12½—12½—5% below the list price, that is the minimum, and he can sell as much above that as he desires.

**[Testimony of William F. Pfeiffer.]**

**[33]** WILLIAM F. PFEIFFER testified as follows:

I am secretary and assistant treasurer and general manager of The Miller Rubber Company, of Ohio.

I am secretary of The Miller Rubber Company of California.

The Miller Rubber Company of California gets its goods and merchandise, that it sells, from The Miller Rubber Company, of Ohio.

The goods are shipped on the order of such merchandise as is required to take care of the demand—it is based on sales—and the payments, I think, are

(Testimony of William F. Pfeiffer.)

deposited and drawn on later by The Miller Rubber Company, of Ohio.

The Miller Rubber Company of California was organized because we understood that a gentleman named Miller, who had retired from business, was coming to the Coast to organize a company to manufacture tires. We had expended considerable money here in establishing our sundries business under the name of The Miller Rubber Company. This was a Mr. W. B. Miller who came out here, and he was after some of our organization to come out here and take charge of the factory under the name of The Miller Rubber Company, so we incorporated to protect ourselves against the trade that was established here—the competition.

I know all of this because he attempted to employ some of our expert men for the purpose of coming out here.

All goods were shipped by The Miller Rubber Company to The Miller Rubber Company of California.

[34] The credit department is a part of the treasury department, and they were instructed by the treasurer and myself, as general manager, to safeguard the funds of The Miller Rubber Company, of Ohio, and the funds were—our records show it, I am not positive—I think the money was all collected here and the checks drawn payable to The Miller Rubber Company of California for all funds payable to The Miller Rubber Company, of Ohio.

The California Company had no possession of the

(Testimony of William F. Pfeiffer.)

property, merely acting as agent for The Miller Rubber Company, of Ohio, and those officers in California—we had two officers in California, were employed by The Miller Rubber Company, of Ohio, and received their pay from The Miller Rubber Company, of Ohio; all payments were made by The Miller Rubber Company. (Upon motion the latter part of the answer was stricken out, and the evidence stood subject to the motion.)

There were no books upon which we made any charge for goods shipped to the California Company from Ohio. They are two separate corporations, to wit, The Miller Rubber Company and The Miller Rubber Company of California, and the officers of the two corporations are not identical, the personnel is almost the same. Jacob Pfeiffer, President of both companies; F. B. Theiss, treasurer of both companies; myself (William F. Pfeiffer), secretary and general manager of both companies.

The Miller Rubber Company of California has five officers, two reside in California.

Five people were organizers of The Miller Rubber Company of California and signed the articles of incorporation.

[35] We did not have a separate set of books for The Miller Rubber Company of California in California, to my knowledge.

..The Miller Rubber Company, of Ohio, does not keep an account on its books for The Miller Rubber Company of California—not exceeding as a memorandum. It is a memorandum slip. The account of

The Miller Rubber Company of California appears on the books of The Miller Rubber Company, of Ohio, no more than a memorandum. It is simply to know where the goods are that belong to The Miller Rubber Company, of Ohio.

The books of The Miller Rubber Company, of Ohio, show if there was some money deposited here by The Miller Rubber Company of California to the account of The Miller Rubber Company, of Ohio, because our depositors send us duplicates of the deposit slips in the depository here.

Checks were drawn on the account which was kept in Los Angeles by The Miller Rubber Company of California. It checked out all of the account and I signed the checks as an officer of The Miller Rubber Company of California.

The Miller Rubber Company of California maintained its separate organization here in California to comply with the law.

They kept a minute-book.

All of the property that was deposited with The Miller Rubber Company of California belonged to The Miller Rubber Company of Ohio. That is true as to the money also.

**[Testimony of C. B. Conlee.]**

**[36]** Mr. C. B. CONLEE, employed by Mr. Wetzel, Manager of The Miller Rubber Company of California, and credit manager of The Miller Rubber Company, of Ohio, who had been an employee of W. D. Newerf Rubber Company for two years prior to



(Testimony of C. B. Conlee.)

the filing of the petition of bankruptcy, testified as follows:

There were other goods stored in the same room with the Miller stock on the north side of Hope Street. They were not supposed to be but they were.

There were signs up there with The Miller Rubber Company's name on them.

There are also certain goods, of those same goods that have been reconsigned to various people.

Mr. Bailie, of counsel for the trustee herein upon cross-examination of W. D. Newerf, the bankrupt in reference to the amount, if any, which might be due from him to The Miller Rubber Company (objected to by Mr. Smith, one of counsel for The Miller Rubber Company, as being incompetent, irrelevant and immaterial), stated:

"We are not trying that now."

**[37]    Objections to Report of Audit Company.**

We object to this report:

First, as to the computation of commissions in that in the recapitulation he has used Mr. Newerf's ideas on commissions in making the recapitulation.

Second, we object to the report and the statement therein of \$269.98 should be repaid as a preference, there being no evidence of its being a preference.

Third, we object to the report in that it does not show that commissions due to Newerf were credited on the amount owing by Mr. Newerf to the Miller Rubber Company.

**[38]**    A price list was furnished by The Miller

Rubber Company to W. D. Newerf, and by The Miller Rubber Company of California to W. D. Newerf, Agent, under the contract of June 11th, 1914, which states, after giving the prices at which tires are to be sold, "Terms 5% cash ten days."

**[Receiver's Exhibit No. 1—Letter, June 24, 1914.]**

[39] (Letter-head.)

Akron, Ohio, June 24th, 1914.

W. D. Newerf Rubber Company,

Los Angeles, California.

Gentlemen:

You will please be advised that the writer has gone over the figures which were drawn up while with you as also contract and the matter will be fully submitted to you shortly.

We have to-day wired you that stationery will be expressed to you to-morrow, thus permitting your starting on our new proposition commencing July 1st.

We wish to confirm, however, the conversation which we had with you on some of the points which were brought up for discussion, and which are not covered by the contract.

Title on Consigned Stock.

Under the new arrangement we would suggest that you have typewritten or stamped with a rubber stamp on the bills of your subconsignments the fact that any stock which is billed out on memorandum only that the title remains with the Miller Rubber Company of California. We understood it has been customary for you to bill these out with prices extended

which, to our minds, should be safeguarded.

Insurance on subconsignment stocks.

On all new contracts covering consigned stock you will please insert the paragraph which the writer suggested with reference to our charging subconsignments through *pro rata* share of insurance. We carry a floating insurance policy and shall be very glad to make charges to you covering this insurance for your subconsignments at periods of three months.

Old Stock.

Please have someone look over the stock monthly who understands the needs of your business thoroughly, and who can thus intelligently eliminate any tires which are bound to remain with you for an indefinite period. We want to keep your stock [40] as new as possible and also this gives us an opportunity to dispose of tires elsewhere which you find it impossible to sell and might eliminate a considerable *loss* to us.

Schedule of tires.

The schedule which your Mr. Sahland submitted to the writer has been referred to Mr. White, who has charge of our consignment department, and you will undoubtedly hear from us very shortly with reference to this list.

Kindly note that you have promised to make your reports as promptly after the 25th as is possible. Kindly do this.

Adjustments.

Please be advised that Mr. Newerf has consented to our arranging that in the future all adjustments shall be net, and that the only compensation to you

is the ten per cent (10%) commission which shall be forthcoming with your commission statement.

Also kindly note the suggestion which the writer made that you have someone check over your inventory occasionally who is not in the custom of so doing. This may show up some discrepancies in your stock which otherwise would remain unknown for a long period of time.

Yours very truly,

THE MILLER RUBBER COMPANY OF CAL.  
CRW—GD. Credit Department.

Filed. U. S. District Court. No. 1972. Receiver's Exhibit No. 1. March 30th, 1915. Helm, Referee.

**[Receiver's Exhibit No. 2—Letter , July 23, 1914.]**

**[41]** (Letter-head.)

Akron, Ohio, July 23d, 1914.

W. D. Newerf Rubber Company,  
Los Angeles, California.

Gentlemen :

The writer has been obliged to refrain from mailing the contracts back which he brought from Los Angeles duly signed by Mr. W. D. Newerf due to the fact that in going over the situation with the different departments at the factory they have felt that there were some changes necessary.

Conditions have changed quite materially even since the making of our agreement with you last July, and in view of the misunderstanding which we had and have had for the last year it has been a matter



of considerable application on our part to draw up the contract which is satisfactory to everyone concerned. We believe, however, that we have accomplished this and we return herewith a new contract and supplement in duplicate for your signature. Also accompanying the same is the original and duplicate contract signed by W. D. Newerf under date of June 11th.

The purpose of the contract which we have drawn up is similar to the purpose of the contracts of June 11th, and which we return herewith for cancellation. There is one thing we believe which we have been successful in doing, and that is that you will find the prices on accessories and repair materials are a little lower, the discount being larger. These prices are applicable to business from July 1st, only. Please bear this in mind.

A number of changes in the contract are made simply with the idea in mind of making the interpretation of the contract easier, and we urge that you go over the matters seriously, sign and return to us without delay. We are very much interested in lining the Coast proposition up properly at the earliest possible moment, but for some reason or other we seem to be subjected to delays more or less. If we can have your co-operation in this matter it will assist materially in reaching the desired result.

[42] You will also find enclosed proposal for credit insurance contract which the writer agreed to look into upon his return. The loss which you would be obliged to sustain prior to participating in this policy is a little more than we believed originally, being

\$3,000, but you are guaranteed against loss for \$5,000 as a total. There are several limitations of this contract which should be considered by you in determining whether or not it is going to meet your requirements.

The first in line A-1 which follows line 13 as also A-2 immediately following. The explanation of these two lines is that the limit of any one account shall be 20% of his lowest capital rating, and not exceeding \$2,500 gross, all ratings being based on the Dun book. You will notice from the flier attached that it specifies what percentage of loss the Insurance Company stands if the debtor has certain ratings. That in certain instances they stand 66 $\frac{2}{3}$ % of the gross loss, no limit to be more than \$250 and where the rating is blank and the capital blank the percentage that each shall sustain as a loss is the same 66 $\frac{2}{3}$ %; that with unmentioned or professional customers there shall be a single limit of \$250 and the Insurance Company will stand 50% of any loss sustained by you.

Now the question uppermost in the writer's mind is whether or not the greater percentage of your customers are rated, We believe they are, as our impression is that you are doing a wholesale business largely. If we are correct, do the larger percentage of your customers have pretty fair ratings? Not having a detailed knowledge of your business, it is a mighty hard question for us to conclude whether or not this policy is going to benefit you to any extent. You are covered, understand, for the premium aforementioned limitation of maximum loss under the policy being \$5,000.

[43] Please understand that if your losses totalled \$8,000 in the year you would have to lose originally \$3,000 and the balance would be covered by the insurance policy.

Now, this premium rate can be reduced as also the initial cost of \$3,000 by your furnishing the Insurance Company with a statement of your losses for the past three or four years and the percentage of such losses to total sales. The writer is unable to give the Insurance Company this data and they arbitrarily made the premium on the basis of two per cent (2%) with an initial loss of \$3,000, these figures of course not being worked out in any particularly scientific manner.

We shall be very glad to have your full response in reference to this at your early convenience and hope that you will accompany the contracts with information bearing on this subject.

Also please advise us what has been done about the Bond which J. B. Newerf & Son wrote and are holding for our contract.

Yours very truly,

THE MILLER RUBBER COMPANY OF CAL.  
CRW—GD.

Credit Dep't.

U. S. District Court. No. 1972. Receiver's Exhibit No. 2. Filed March 30th, 1915. Helm, Referee.

**[Receiver's Exhibit No. 3—Letter, August 13, 1914.]**

**[44]** (Carbon Copy.)

Los Angeles, California. August 13th, 1914.

Miller Rubber Company,

Akron, Ohio.

Gentlemen:

In accordance with your request, we have signed contracts recently received but have added to contract clause reading as follows: ("Party of the first part agrees to allow one-half of the expenses of W. D. Newerf or his Manager, to the factory at Akron, Ohio, for at least once a year during the life of this contract.") This you have neglected to include in the last contract you have submitted, evidently an oversight. Therefore, we are making it a part of the contract and have signed same with this understanding.

You appear to be in very much of a hurry to get this contract back, and probably have overlooked the fact that you were over a month in returning the contract to us after same had been closed and signed as we supposed on June 11th. However, same has been executed and sent to you as above.

We trust now, with the final execution of this contract, that there will be no cause for any further misunderstandings and that the Miller Rubber Company, Akron, Ohio, will appreciate the necessity of co-operating fully with the Miller Rubber Company of California, W. D. Newerf, Agent, and further appreciate the necessity of shipping goods to the Miller



Rubber Company of California. This seems to be a worn-out subject, but nevertheless a decidedly important one and at this writing we are in as bad a shape as ever we were in having stock to supply our daily demands.

It is very evident that your consignment department is not familiar with conditions as they exist here in this territory. [45] They do not seem to take into consideration distances, time and the question of subconsignments. They seem to glance at a card record that you may have that is always old and conclude that The Miller Rubber Company of California has a large stock on hand, and do not take into consideration that we are subject and are receiving orders daily in Los Angeles and in San Francisco for tires and tubes for immediate delivery.

Some of our subconsignments are three hundred and four hundred miles distant from this point, Los Angeles. Therefore, you can readily appreciate how impossible it would be to get a tire from that distance to be delivered in fifteen minutes.

Mr. Wetsel should be entirely familiar with this condition as he was here on the ground and these matters were called to his attention. Should Mr. Millhoff or Mr. Pfeiffer ever be able to come out here they in turn would see the conditions as they exist.

I understand that you feel that the \$60,000.00 stock is a large one for this Western territory. I wonder what you will say when I tell you that the B. F. Goodrich Company carry in Los Angeles alone a \$375,000 stock of tires and undoubtedly an equal amount in

San Francisco. This you see makes the Miller proposition look like a two cent piece as a matter of comparison.

Furthermore Miller with its high-priced tire on the recent advance raised fifteen per cent while Goodrich with its low-priced tires raised twelve and one-half per cent. You must understand that all these things effect volume of business. Mr. Millhoff as General Sales Manager of the Miller Rubber Company is undoubtedly interested in increasing volume of business. He should appreciate the fact of the impossibility of increasing volume of business on the Pacific Coast on the limited stock of goods that you give us to do business with. As before stated we do not like or wish to criticize or complain, it is farthest [46] from our minds to do so, but we do wish to impress upon you if possible the existing situation and the absolute necessity of your furnishing us a sufficient stock of goods to do business with that the territory demands and prices and discounts that are at least reasonable.

Upon the writer's return from out of the city he finds that you have been complaining by telegram and letter of our not having sent reports to you promptly. This we must take exception to for the reason that since the first of July when our new deal went into effect we have forwarded to you daily and promptly duplicate invoices and credit memorandums of each transaction that has taken place. We did not understand that we are to send you reports in addition to these duplicate invoices and we also understand that the duplicate invoices that you receive

daily give you complete information of what business is done, therefore, we fail to understand how you refer to us delaying sending you reports.

The question of inventory we have answered you in a former letter which is self-explanatory.

We received advice the other day that by your Texas Agent going to Akron he was able to get several carload shipments of tires which they were very much in need of for their territory. This probably accounts in a degree for our not getting any tires. It is a pretty hard proposition for us to jump from Los Angeles or San Francisco to Akron to get deliveries as it is a long trip and an expensive one and certainly should be unnecessary. However, judging from the experience of your Texas Agent it is necessary to get results.

Will you kindly acknowledge receipt of this letter and advise us what you can do for us.

Yours very truly,

W. D. NEWERF RUBBER CO.

per \_\_\_\_\_.

WDN—LC.

No. 1972. U. S. District Court. Receiver's Exhibit No. 3. Filed March 30th, 1915. Helm, Referee.

**[Receiver's Exhibit—Letter, August 22, 1914.]**

**[47]** (Letter-head.)

Akron, Ohio. August 22d, 1914.

W. D. Newerf Rubber Co.,

Los Angeles, California.

Gentlemen:

Your contracts were duly received and submitted with one addition thereto. Accept our thanks for same.

Permit us, however, to call your attention to the fact that we wrote you quite fully with reference to the manner in which security is required by us so to be given. You have not responded but we should like a reply by return mail as to whether or not it is your intention to furnish us with a personal security bond or if it is preferable to take out credit insurance.

We enclose such a bond as we require and immediately upon receipt of your reply we will advise you as to our decision in this respect.

Yours very truly,

THE MILLER RUBBER COMPANY OF CALIF.

CRW—GD.

Credit Dept.

U. S. District Court. No. 1972. Receiver's Exhibit. March 30th, 1915. Helm, Referee.

**[Receiver's Exhibit No. 5—Letter, August 28, 1914.]**

[48] (Carbon Copy.)

Los Angeles, Cal. August 28th, 1914.

Miller Rubber Co.,

Akron, Ohio.

Attention Credit Department.

Gentlemen:

In reply to your letter of August 22d will say that we note you have received contracts properly executed and which you have acknowledged. How is it you do not return one of the copies to us.

Relative to the bond of which you enclose a form. The reason that we have made no effort in this direction was because it was our understanding that you were going to attend to this matter yourself with the credit insurance matter. However, if you prefer



the bond we will again take the matter up with the bonding company with a view of having them issue this bond to you with the understanding of course that you are to pay the premium. If the matter could be covered by credit insurance we believe that it would be the better way to do. As a matter of fact, Mr. Wetsel, there will be no shortage in tires and there will be a very small amount of loss on accounts we can assure you because we will make it our special business to see that Miller's interests are protected on this deal. But, as stated before, we are willing to comply with your requirements in whatever would be a proper form. Awaiting your further advice, we are,

Yours very truly,

W. D. NEWERF RUBBER COMPANY.

WDN—PE.

Per \_\_\_\_\_.

U. S. District Court. No. 1972. Receiver's Exhibit No. 5. Filed March 30th, 1915. Helm, Referee.

**[Miller's Exhibit No. 9—Letter, September 14, 1914.]**

**[49]** (Letter-head.)

Los Angeles, Cal. Sept. 14th, 1914.

Miller Rubber Company,

Akron, Ohio.

Gentlemen:

We are in receipt of your night letter of September 12th and replied to same as per our telegram this date and herewith beg to confirm same:

“Complying your request. Mailing check and note to-day. Advise bank.”

We are enclosing you herewith our check for \$139.75 same being interest on notes falling due September 15th, amounting to \$154.98 less \$15.23 interest that we have charged back to you on commissions earned and payable to us of \$2,770.01 for July, or in other words we are charging you the interest from August 13th to September 15th, and you will apply this amount on our notes which we trust you will find satisfactory.

There appears to be a considerable difference between us in the commissions earned for July and August. Our figures total for both San Francisco and Los Angeles \$7,091.19. The difference between this amount and the face of the notes due September 15th \$9,149.35 would be as you see \$2,058.16 and for some reason or other you have figured our commissions different which we fail to understand.

However, we as stated in telegram are complying with your request and enclose you our note for \$1,000 and our check for \$1058.16, this in accordance with our figures would be overpaying you about \$1,000. However, we are making up a complete statement of commissions earned as of July and August and will send same to you within the next few days showing you how we arrive at our figures and inasmuch as you have been kind enough to show a disposition to assist us to some extent we wish to show our appreciation accordingly by quickly sending you the [50] enclosed remittance, and wish to thank you for the co-operation.

We will write you fully in connection with our re-

port that we will send you immediately as above stated within a few days.

Yours very truly,

W. D. NEWERF RUBBER CO.

WDN—BM.                      Per \_\_\_\_\_,

U. S. District Court. No. 1972. Miller's Exhibit  
No. 9. April 5th, 1915. Helm, Referee.

**[Miller's Exhibit No. 13—Night Letter.]**

**[51] (Night Letter.)**

Akron, Ohio.

W. D. Newerf Rubber Co.,

Cor. Pico and Hope Streets,

Los Angeles, California.

August check for commissions as three thousand one hundred seventy-three dollars and two cents and with July commissions will be applied by us on notes fifteenth. You understand, however, we do so on condition you mail us the balance Monday as follows: Ninety-day note for two thousand dollars and your check for two thousand eleven dollars and seventeen cents plus interest and collection charges on notes forwarded for collection. You can surely spare check for this latter amount. Wire us Monday early that you are complying and we will arrange to relieve you of further annoyance Tuesday. This proposition submitted you in absence of Mr. Pfeiffer and we urge your strict conformity in every respect.

MILLER RUBBER CO.

U. S. District Court. No. 1792. Miller's Exhibit  
No. 13. Filed April 5th, 1915. Helm, Referee

**[Miller's Exhibit No. 10—Letter.]**

**[52]** Letter-head.)

Akron, Ohio.

W. D. Newerf Rubber Company,  
Los Angeles, California.

Gentlemen:

Your telegram of the 20th duly received with reference to July commissions.

In view of the correspondence going forward to-day you realize perhaps one reason for our not taking care of this as promptly as you might wish and we might add that another reason which you may fail to realize and to which we refer in the aforementioned letter is the lack of July billing which was not received by us until late in the month.

What we propose to do is to send a check covering said commissions of July to the Citizens National Bank of Los Angeles with instructions to reduce the amount of the notes due on September 15th, by such sum which under the existing circumstances we are confident will meet with your entire approval.

We cannot see how under the conditions you can criticise our action in this respect and shall be pleased to receive your acknowledgment that this is entirely satisfactory.

Yours very truly,

THE MILLER RUBBER COMPANY OF  
CAL.

Credit Dept.

CRW-GD.

U. S. District Court. No. 1972. Miller's Exhibit  
No. 10. Filed April 5th, 1915. Helm, Referee



[Miller's Exhibit No. 11—Letter December 3, 1914.]

[53]    (Carbon Copy.)

Akron, Ohio, Dec. 3d, 1914.

W. D. Newerf Rubber Company,  
Los Angeles, California.

Gentlemen:

San Francisco is billing accessories out under the name "The Miller Rubber Company of California." Why have you not handled your accessory business on this basis?

The contract and supplement which we entered into distinctly calls for such an operation and we will have to ask that commencing the first of next month that you make no further sales through the W. D. Newerf Rubber Company, that all sales be billed out as contemplated by the contract under the name "The Miller Rubber Company of California," as sold.

Please acknowledge receipt of this letter assuring us that our wishes in this respect will be carried out in future.

Yours truly,

THE MILLER RUBBER COMPANY OF  
CALIF.

Credit Department.

CRW-GD.

U. S. District Court. No. 1972. Miller's Exhibit No. 11. Filed April 5th, 1915. Helm, Referee.

**[Trustee's Exhibit "A"—Letter, Miller Rubber Co.,  
Akron, Ohio, to Miller Rubber Co., Los Angeles,  
Cal.]**

**[54] (Letter-head.)**

**Akron, Ohio.**

**(Subcommissions.)**

**The Miller Rubber Company of California,  
Los Angeles, California.**

**Gentlemen:**

We are in receipt of your favor of the 25th ult., including commission statements for July and August, the difference in our statements exists in the point that we deducted five per cent (5%) for cash from all invoices whereas you figured them net. In this connection we prefer to handle the matter a little differently. We would suggest as we have been doing in the past deduct five per cent for cash from all invoices and then if these invoices are paid net by the customer that you make out a list of cash discounts due you at the end of the month and forward the same to us to be checked. This will then be included in our regular monthly installment to you.

Regarding the figuring of commission by the total amount of figures for one month we would say that if you desire you may check our figures accordingly but we ourselves prefer to figure out each individual invoice although it involves more work. If there is a mistake in our figures it is more difficult for you to point out the mistake by the method you use than if figured by each individual invoice.

Of course it is for you to decide as to the method

you will use in checking our figures but we would like to have you go over our figures each month to insure yourselves and not only ourselves that you are getting the correct amount of commission for the business you secure for us.

Trusting that this method will appeal to you and that we shall hear from you further along these lines we beg to remain.

Yours very truly,

MILLER RUBBER COMPANY OF CALIFORNIA.

Commission Dept.

PEC-LL.

U. S. District Court. No. 1972. Trustee's Exhibit "A." Filed June 25th, 1915. Helm, Referee.

[Trustee's Exhibit "B"—Letter, October 15, 1914.]

[55] (Carbon Copy.)

Los Angeles, Calif., October 15th, 1914.

Miller Rubber Co.,

Akron, Ohio.

Gentlemen:

Attention Commission Department.

Your letter of the 5th inst. received. We note that in figuring commissions you deduct five per cent cash discount from all invoices. We cannot agree with you that this is correct.

The contract our copy of which you have not yet returned to us provides that our commission is to be the difference between  $12\frac{1}{2}\%$ — $12\frac{1}{2}\%$ — $10\%$ — $5\%$  off list and the prices at which goods are sold to customers. The price to customers is the invoice price.

At time the commissions are figured at close of

month's business there is no way of telling whether customer may in future take cash discount.

We, therefore, maintain that our method of arriving at amount of commissions is correct besides being simpler and involving much less work.

In this connection we beg to say that the demands upon us by Miller Rubber Company in the way of bookkeeping, clerical work, etc.: are constantly becoming greater and as we are already doing all that should be expected of us along these lines we do not feel inclined to do more.

We send to you daily copies of all invoices and credit memorandums also collection statements. You thus have complete information of all movements of stock and of the condition of customers accounts.

The compiling of this information is up to us and we cannot undertake to do it unless you wish to make an allowance to cover cost of the work.

Yours truly,

W. D. NEWERF RUBBER CO.,

Per \_\_\_\_\_,

J. F. R.-L. C.

U. S. District Court. No. 1972. Trustee's Exhibit "B." Filed June 25th, 1915. Helm, Referee.

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[56] (Caption.)

**Special Master's Report.**

To the Honorable Judges of the District Court of the  
United States, Southern District of California:  
I, Lynn Helm, Referee in Bankruptcy, by an order



entered herein on the 23d day of March, 1915, appointed Special Master upon the petition of the Miller Rubber Company, for the delivery of certain property in the possession of the receiver of this court, to hear and determine the issues raised by said petition and such answer as might be filed by the receiver or the petitioning creditors in reply thereto, and to report my findings of fact and conclusions of law to the court, do respectfully report:

That I was attended by Messrs. Bicksler & Smith, counsel for the Miller Rubber Company, and also by Norman A. Bailie, Esq. and Dave F. Smith, Esq., attorneys for the Citizens Trust & Savings Bank, receiver herein, and having heard the testimony produced on behalf of the Miller Rubber Company and on behalf of the bankrupt, and having heard the arguments of counsel and being fully advised in the premises do respectfully report as follows:

1. I find that on the 6th day of November, 1911, the Miller Rubber Company, the petitioner herein, and the Prudential Rubber Company, and W. D. Newerf, doing business as the W. D. Newerf Rubber Company, entered into a contract (Claimant's Exhibit 2), which is hereto attached.

By the first clause the companies agreed to appoint the bankrupt their sole agent and he agreed to act for them in the capacity of agent in making sales of automobile tires and tubes for certain Pacific Coast territory. He also agreed to maintain offices at Los Angeles and San Francisco. The companies agreed to furnish the bankrupt, on consignment, a stock of goods for the purpose of *supply* customers in said

territory, the quantity to be limited to a reasonable amount.

[57] The fourth paragraph provides "the second party expressly agrees that all goods or stock of goods so furnished by the first parties shall at all times be and remain the property of the first parties until sold and delivered to *bona fide* customers in the usual manner." It was then provided that the bankrupt should furnish the companies the first of each month a complete inventory of all goods belonging to them in the hands of the second party and permit them to take inventory of stock on hand and to make monthly settlements for all purchases from and all shortage in stock. By the seventh paragraph it was provided:

"When desired by second party, four months' notes drawing interest at 5% will be accepted by first parties in settlement for all purchases made by second party from first parties, provided, however, that the total maximum of such notes shall not exceed \$25,000 at any one time during the first year of this contract, and that such maximum after the first year is to be subject to mutual agreement of both parties, but not less than \$25,000 unless credit of second party becomes impaired."

In the ninth paragraph it was provided that upon the expiration or termination of the agreement, or any renewal thereof, bankrupt should surrender and turn over to first parties all property belonging to them, and make full and complete settlement of accounts for all property that may have been entrusted to them. A schedule of prices was attached, the dis-

counts allowed to be the bankrupt's profits in handling the goods.

There has been no agreement between the parties to this contract as to its termination and no notice has been given by the companies of its abrogation and it is still in full force as to goods shipped by the Miller Rubber Company of Ohio to the bankrupt prior to July 1, 1914.

2. I also find that on the 28th day of August, 1914, the Miller Rubber Company of California entered into an agreement [58] with W. D. Newerf, the bankrupt, as of date June 11, 1914, and to take effect on the first day of July, 1914, which is returned herewith marked "Miller Rubber Company's Exhibit No. 3" which is hereto attached.

3. At the same time and as supplemental to the agreement last herein mentioned, an agreement as of date June 11, 1914, was entered into between the Miller Rubber Company of California and W. D. Newerf, and which is attached to exhibit 3 last above referred to, hereto attached.

4. I find that the Miller Rubber Company who filed the original petition to reclaim certain goods herein is a corporation organized and doing business under the laws of the State of Ohio, and having its principal place of business at Akron, in the State of Ohio.

5. I find that the Miller Rubber Company of California is a corporation duly organized and existing under the laws of the State of California, with its principal office at San Francisco, in the State of California, and also having an office at Akron, in the

State of Ohio. The Miller Rubber Company of California, last mentioned, was organized for the purpose of acting as the agent in handling and selling the goods of the Miller Rubber Company of Ohio and to enable the Miller Rubber Company of Ohio to have a representative in the State of California, thereby saying the Miller Rubber Company of Ohio from filing a certificate and paying license fees, and being licensed to do business in the State of California. It was also organized to protect the name of the Miller Rubber Company in California, and to prevent so far as possible trade competition therewith. It is a distinct corporation from The Miller Rubber Company of Ohio and while it does appear from the evidence that the officers of the two corporations are the same and it is owned and controled by the stockholders of the Miller Rubber Company of Ohio, [59] nevertheless the Miller Rubber Company of California is a distinct entity and must be in all respects treated as such in its dealings with the bankrupt.

The petition originally filed herein was by the Miller Rubber Company of Ohio. It was apparent after the contracts above referred to were offered in evidence that the tires and accessories which were desired to be reclaimed at once and which were necessary to supply the Miller Rubber Company's trade in California were the property of the Miller Rubber Company of California and could not be recovered by the Miller Rubber Company of Ohio, and permission was therefore given to the petitioner to file an amended petition and join therein with the Miller Rubber Company of Ohio, the Miller Rubber Company of



California, it being understood that the allegations of the amended petition should be deemed denied by the receiver. This amended petition of The Miller Rubber Company of Ohio and the Miller Rubber Company of California is returned herewith and the proceedings subsequent to the filing of the same were had upon that amended petition as well as the original petition.

6. The questions presented are the proper construction of, and the effect to be given to, the several agreements above set forth, as between The Miller Rubber Company of Ohio and the Miller Rubber Company of California, and the bankrupt. Taking these up in their order I have come to the conclusion that all goods and merchandise shipped and delivered by the Miller Rubber Company of Ohio to W. D. Newerf, under the contract of November 6, 1911, and prior to the first day of July, 1914, and which came into the possession of the receiver herein at the time of his appointment, became the property of the bankrupt's estate and as such pass to the trustee in bankruptcy. At the time of the bankruptcy these goods were in the possession of the bankrupt, commingled with other property and goods in his possession. They have since been segregated by the receiver and trustee and are held by the trustee subject to these proceedings, The rights of [60] the parties depend upon the real and complete agreement between the Miller Rubber Company of Ohio and the bankrupt.

As was said by the Court, in re Harrington, 32

A. B. R. 828, in passing upon a similar question—

“The Court is not limited to the mere language of the written instrument; it may examine all the facts concerning the matter and determine whether the written contract was made in good faith or was merely colorable, and if made in good faith whether its provisions for the retention of title were waived by the vendor.”

In *re Garcewich*, 8 A. B. R., 149, was upon a petition for the review of an order of the District Court as a court of bankruptcy, directing the trustee to return to the United Shirt & Collar Company certain goods, ware and merchandise claimed by that company to belong to it and claimed by the trustee to be a part of the bankrupt's estate. The goods were sold to the bankrupt by the United Shirt & Collar Company upon credit and upon the understanding that the title to such of them as should not be sold by the bankrupt should remain in the vendor until the payment of the purchase price. The Court said:

“It is the settled law of this State that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear. But

when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable, [61] and the title to have been vested absolutely in the buyer. *Ludden v. Mazen*, 31 Barb. 650; *Frank v. Batten*, 49 Hun. 91, 1 N. Y. Supp. 705; *Bonesteel vs. Flack*, 41 Barb. 435. When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee."

In *re Miller & Brown*, 14 A. B. R. 439, the Magee Carpet Company sold to the bankrupts certain carpets upon the understanding that what the firm sold should be paid for and what they did not sell could be returned. The Court said of this order:

"It constituted nothing more than what is known in the law as a contract of 'sale or return,' in which the title passes to the party to whom the goods are delivered, subject to the exercise of the option given to return them if he so desires. *Moss v. Sweet*, 16 Q. B. 493; *Hunt v. Wyman*, 100 Mass. 198; *Hickman v. Shimp*, 109 Pa. 16. This, it is true, is not the case where the party has the option of returning the goods, if they prove unsuitable or unsatisfactory, of which he is necessarily the Judge, the consignee there holding as bailee for the time within which he is called upon to declare his purpose with regard to

them, which, if unspecified, must not exceed what is reasonable. *Butler v. School District*, 149 Pa. 351. But where the right to return does not depend upon any such consideration, but upon the mere will of the consignee, however moved, the transaction is a sale, and the title vests. 24 Am. & Eng. Ency. Law (2d ed.), 1024. And that is the situation here."

It is said of this case that it was decided by the District Court of the Eastern District of Pennsylvania and that conditioned sales are not favored under the laws of the State of Pennsylvania, but that in all cases where conditional sales might be good in other states they have been held to be invalid under the laws of [62] the State of Pennsylvania, and that the title immediately passes to the vendee. It was recognized in that case that in cases of this character the local law governs and that the title of the trustee is determined by the question whether the arrangement with regard to the property is good as regards creditors. The same criticism cannot be made with reference to the decisions of courts in the states of New York or Massachusetts, for they like California recognize in all respects the rights of vendors in conditional sale contracts.

In the matter of *Harrington*, *supra*, decided by the District Court of Massachusetts, the property in dispute consisted of a great number of parts of automobiles for us in Everitt cars, at the time of the bankruptcy in the possession of the bankrupt, commingled with other goods. They were subsequently separated by the trustee and held subject to the proceedings in that matter. The claimant of the



goods had granted to the bankrupt the sale of Everitt automobiles in certain New England States and had agreed to sell said automobiles to the dealer at certain specified discount prices, the bankrupt to be allowed 30% discount from the last list prices established by the manufacturer. The ninth clause of the contract provided that it was "expressly understood and agreed that the title to each and every automobile and to all automobile parts furnished to said dealer under the terms of this agreement shall not pass to the dealer until same is fully paid for in full and cash." The dealer deposited with the manufacturer the sum of \$3,000 to apply as deposit on the cars ordered, with the understanding that said sum "will be credited by the manufacturer to the dealer, and will be repaid when all the cars contracted for are delivered and paid for, except that any part or all of said deposit may at the option of the manufacturer be credited against any parts of open account due the manufacturer from the dealer."

[63] The dealer agreed to maintain the manufacturer's list price, to keep a repository and repair shop for automobiles, and that the deposit might be retained by the manufacturer as liquidated damages for the dealer's breach of the contract. The Court said:

"The parts of the Bankruptcy Act by which the rights of the parties are to be determined are as follows:

'Claims which for want of record or for other reasons would not have been valid liens as against

the claims of the creditors of the bankrupt shall not be liens against his estate.' Section 67a.

'Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' Section 70a (5).

'And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon.' Section 47-(2).\* \* \*

It is apparent that neither the claimant nor the dealer understood or believed, either at the time when the written contract was made or subsequently, that its terms were to be lived up to. Its stringent provisions in regard to the retention of title were inserted, not for the purpose of every day business, but only in an effort to safeguard the rights of the vendor in case the dealer should fail. The parties plainly contemplated that the parts in question were to be taken and kept by the bankrupts in order that they might be promptly accessible for repairs upon Everitt automobiles in the dealer's territory, and that, as such parts should be needed for repairs, the bankrupts should sell and deliver them to the persons upon whose automobiles the parts were used.

[64] It is absurd to suppose that the claimant can now replevy, from the various persons whose Everitt cars were repaired by the bankrupts, the parts used in such repairs, although by the literal terms

of the contract of June 26, 1911, the claimant would have that right. Both parties to the contract understood that it did not mean what it said, and that the dealer did have the right to sell and dispose of parts in the ordinary course of business. It is to be observed that the vendor made no reservation of its right to the proceeds of such sales, no provision to insurance upon the parts, no prohibition against mingling the parts with other goods, or the proceeds of the sales with other money of the dealer. The actual agreement between the claimant and the bankrupts is to be gathered, not from a single clause of the written contract, but from the complete understanding between the parties. The formal reservation of title in the written instrument is contradicted and nullified by the unwritten parts of the agreement, and the written contract is *pro tanto* merely colorable. \* \* \*

The case is of course to be determined according to the law of Massachusetts, under which special interests in personal property are strongly protected. At the same time it seems to me that—

‘The real purpose and understanding (of the parties to the contract) were to make an effectual sale, and that the writing, even if interpreted to withhold the title by its terms, was merely a convenient resort to provide the right to take the goods in event of disaster overtaking the (Harrington) concern.’ Day, J., in *Ludvigh, Trustee, v. American Woolen Co.*, 231 U. S. 522, 31 Am. R. B. 481, 34 Sup. Ct. 161, 58 L. *Red.* —, December 15, 1913.

Several of the most important factors which were

relied upon by the Supreme Court in the Ludvigh Case as indicating good faith and the validity of the agreement there in question are entirely absent in this case."

[65] This case was afterwards affirmed on appeal in the Circuit Court of Appeals of the First Circuit, in *Flanders Motor Company v. Reed, Trustee*, 33 A. B. R. 842. Dodge, C. J., delivering the opinion of the Court said:

"The case, as the opinion below states, is to be determined according to the law of Massachusetts, which does not make recording necessary to the validity of an agreement for conditional sale. If the provision for reservation of title in Clause 9 expresses an agreement made in good faith, intended by both parties to be actually observed according to its terms in their dealings regarding the parts in question, and in fact so observed by them until the bankruptcy, the petitioner is entitled to the parts as against the bankrupt's trustee.

We do not find in the fourteen other clauses of exhibit "D" containing numerous other stipulations between the parties as to their contemplated dealings with the goods to be furnished, any provisions adopted to secure such dealings with the parts furnished or their proceeds, while in the bankrupt's hands, as it would be natural to expect had retention of title by the vendor been what the parties really intended by their agreement, taken as a whole. Thus, as the opinion below points out, there were no provisions either that the proceeds should be in the vendors in case of sales made by



the bankrupts or that the parts should be kept distinct in any way from the bankrupts' other goods until sold, or that the parts remaining unsold at the end of the year for which the agreement was to continue should be returned to the vendor. \* \* \*

As to the course of dealing followed with regard to the parts or their proceeds, the bankrupts sold and delivered the parts on hand as if they were their own, in the ordinary course of their business, and without keeping the proceeds of such sales in any way distinct from their other moneys. The parts so sold of course became parts of the machines to repair which they were [66] bought from the bankrupts. The petitioner, knowing that the parts furnished, and the proceeds thereof, were being thus dealt with by the bankrupts, recognized what was being done without objection."

In many respects the agreement in the suit at bar is similar to the agreement referred to in the Harrington case, and the conditions of trading recognized between the claimant here and the bankrupt were similar to those set forth in that case. There were no provisions in the contract and nothing done between the parties in their dealings prior to the first of July, 1914, that were in any way adopted to secure such dealings with tires and accessories furnished by the claimant or their proceeds while in the bankrupt's hands, as would be natural to expect, had the retention of title by the vendor been what the parties really intended by their agreement, taken as a whole. There was no agreement that these goods should be kept distinct and apart from

other goods held by the bankrupt until sold, and the bankrupt actually sold and delivered the tires and accessories delivered by the claimant, in the ordinary course of his business. He did not keep the proceeds of said sales in any way distinct from other moneys and the title to the tires and accessories sold immediately passed to the buyer. The claimants, as the evidence shows, knew that this was the method of dealing by the bankrupt. The provision of the contract that the bankrupt may settle his account with the claimant by the giving of four months' notes is not only significant but is of itself inconsistent with any idea that the title to the goods was to be held and retained by the vendor. The stipulation that the title is to remain with the vendor is entirely inconsistent with these provisions of the contract and with the entire purpose of the contract. This must have been recognized by the claimant or else there was no necessity of entering into the second contract of June 11, 1914, hereinabove referred to, and which is far [67] different in its terms from this contract.

In all respects last above referred to, the agreement of June 11, 1914, between the Miller Rubber Company of California and the bankrupt, and also the agreement referred to in *Ludvigh vs. American Woolen Co.*, 231 U. S. 522, 31 A. B. R. 481, and in *General Electric Co. vs. Brower*, 221 Fed. 597, upon which cases the claimant relies, differ from the agreement here. In these agreements last above referred to a different course of dealing *the parties* appears to have been followed with *respect* to the

goods furnished or their proceeds, and such a different course of dealing is provided for in the several agreements. It is noticeable that the proceeds of sales of goods made by the bankrupt in each of these cases were deposited for the account of, or regularly turned over to, the consignor.

The case of *Ludvigh vs. American Woolen Co.* was first before the Circuit Court of Appeals (188 Fed. 30) and its decision affirmed by the Supreme Court. In the opinion of the Circuit Court of Appeals it was said:

“Contracts of sale under which title is to remain in the vendor, although the vendee may consume the goods or sell them and apply the proceeds to his own use, are fraudulent as to creditors, because the stipulation that title is to remain in the vendor is entirely inconsistent with the purpose of the contract.” citing the decision of the same Court in *Re Garcewich*, 8 Am. B. R. 149, 115 Fed. 87.

In the case at bar there were no provisions to prevent the vendee from thus consuming the goods or selling them and applying the proceeds to his own use, and in *re Garcewich* therefore applies.

The contract here in question, as interpreted by the parties hereto, as shown by their subsequent acts and dealings, was fraudulent as to creditors, and it must be held that the title to the goods in the possession of the bankrupt at the time of the filing of the petition in bankruptcy, and which were purchased [68] by him prior to the first of July, 1914, under the terms of the contract of November 6, 1911, and which came into the hands of the trustee

in bankruptcy, are vested in the trustee in bankruptcy and cannot be reclaimed by the Miller Rubber Company of Ohio.

7. A far different state of affairs pertains to the goods received by the bankrupt from the Miller Rubber Company of California, subsequent to the first day of July, 1914. The contract of July 1, 1914, in all respects comes squarely within the opinion of the Supreme Court in the case of Ludvigh vs. American Woolen Company, *supra*, and with the opinion of the Circuit Court of Appeals of the Ninth Circuit in General Electric Company vs. Brower, *supra*, and it must be held and the goods delivered to the bankrupt as the agent of the Miller Rubber Company of California were held by him under a contract strictly of agency. There is nothing in the contract or in the method by which the business was afterward pursued to in any way impeach the *bona fides* of the contract itself. The goods were kept separate and distinct from other goods owned by the bankrupt and were to be sold by him less an agreed discount, the unsold goods to be returned to the consignor and the proceeds from all goods to be deposited to the account of the Miller Rubber Company of California in the Citizens National Bank of Los Angeles, only to be drawn upon by the duly authorized officers of the Miller Rubber Company of California. The contract was not made for a fraudulent or illegal purpose, but for the purpose of overcoming the evils and weaknesses of the contract of November 6, 1911.

8. Upon the hearing of this matter it became evident that the claimant was entitled to the immediate



delivery of tires, tubes and accessories held by the receiver and coming to it from the bankrupt, who held the property under the provisions of the contract of June 11, 1914. It also became evident that an accounting must necessarily be had between the bankrupt's estate and [69] the Miller Rubber Company of Ohio in reference to the goods purchased from it by the bankrupt and also with reference to the goods handled by the bankrupt as the agent of the Miller Rubber Company of California, and as to the proceeds thereof received by the Miller Rubber Company of California. Accordingly on the 6th day of April, 1915, an order was entered in said matter as follows:

“This cause coming on to be heard upon the order heretofore entered in said court on the 29th day of March, 1915, appointing Lynn Helm, Referee in Bankruptcy, Special Master, to hear the petition of the Miller Rubber Company of Ohio, to reclaim certain goods in the possession of the receiver herein, and an answer having been filed by the receiver, Messrs. Bicksler & Smith appearing for the Miller Rubber Company of Ohio, and Norman Bailie, Esq., Dave F. Smith, Esq., and W. T. Craig, Esq., appearing for the receiver, upon motion of the Miller Rubber Company of Ohio, leave is given to file an amended petition joining in said petition the Miller Rubber Company of California, as petitioner, with the Miller Rubber Company of Ohio, the answer of the receiver heretofore filed to the petition of the Miller Rubber Company of Ohio, to stand as an answer to this amended petition, all matters not

therein admitted to be considered denied.

And thereupon, the Court having partially heard the evidence offered on behalf of the petitioners, and it appearing that the hearing hereon could not be concluded at the present time because of the necessity of taking an account of all transactions between the Miller Rubber Company of Ohio and said bankrupt, and the Miller Rubber Company of California and said bankrupt, but that it was desirable that the goods sought to be reclaimed should be, if possible, delivered to the petitioners, the Miller Rubber Company of California, subject to certain conditions, the Court having heard the argument of counsel and being fully advised in [70] the premises finds from the testimony and the exhibits that have heretofore been offered herein that a contract was entered into between W. D. Newerf and the Miller Rubber Company of Ohio, in November, 1911, which may be known as a consignment contract, under which goods were consigned or sold, as may hereafter be determined, by the Miller Rubber Company of Ohio to Newerf. Subsequently, a contract was entered into between W. D. Newerf and the Miller Rubber Company of California, which is dated June 11, 1914, but was entered into some time subsequent to the 28th day of August, 1914, by which the Miller Rubber Company of California appointed W. D. Newerf as its agent to sell, in certain territory therein described upon a commission basis, the matters under the contract relating to the date as of July 1, 1914.

Newerf was indebted to the Miller Rubber Company of Ohio under the contract of November, 1911,

and had given notes for such indebtedness; he also, on the first of July, had a stock on hand held under the contract of November, 1911. Subsequent to July 1, 1911, Newerf, as agent of the Miller Rubber Company of California sold goods from which he was entitled to commission according to the contract dated June 11, 1914. These commissions were, by specific authority of Newerf given about November 16, 1914, applied upon the indebtedness of Newerf to the Miller Rubber Company of Ohio; since then, the application, if any, has been made without Newerf's consent.

A dispute has arisen between the Miller Rubber Company of California and Newerf as to the amount of the commissions which Newerf should be entitled to, and according to the theory of the auditor of the Miller Company of California, they should not exceed \$12,217.84. On the other hand, Mr. Newerf claims that they should be from eighteen to twenty thousand dollars. It is necessary that an accounting should be taken between the California Company and W. D. Newerf, agent, as to the amount of stock on hand, and the amount of commissions due Newerf, either on [71] account of goods sold and stock for which collections have been made, *or goods sold and stock for which collections have been made*, or goods sold for which remittances are still due. It is therefore ordered that an accounting be taken by the Mushet Audit Company and these accounts as shown by the books of the Miller Rubber Company of California, kept by W. D. Newerf, Agent. The auditor will take the state-

ments of Mr. Wetsel, the auditor of the Miller Rubber Company of California, and also the statement of Mr. Newerf and Mr. Roe, the bookkeeper of W. D. Newerf Company as to their methods of making their respective accounts. If they disagree, the auditor will report the several amounts that the accounts may show upon either theory, either that of Mr. Wetsel or that of Mr. Newerf, or his bookkeeper. The audit company will make a complete audit of the books and as soon as the audit is completed will turn the same over to the Miller Rubber Company of California, but said books to remain in this jurisdiction until the further order of this Court.

An invoice will be taken of goods on hand, received since July 1, 1914, by W. D. Newerf, Agent, from the Miller Rubber Company of California, and they, and all uncollected accounts will be turned over to the Miller Rubber Company of California, upon the Miller Rubber Company of California executing a bond to the receiver in this case in the penal sum of twenty thousand dollars, conditioned that the Miller Rubber Company of California, will on the termination of the accounting pay to the receiver or trustee any moneys that may be found due from the Miller Rubber Company of California to W. D. Newerf, agent, on account of the commissions on goods consigned to him from the Miller Rubber Company of California. And further conditioned for the payment on demand of such portion of any commissions that may be due W. D. Newerf, or W. D. Newerf, bankrupt, on account of



collections from sales of said goods heretofore consigned by the Miller Rubber Company of California to W. D. Newerf, agent, whether upon subconsigned [72] goods, or goods actually sold, as such collections may be made by the Miller Rubber Company of California, and upon agreement of the petitioner in this case, the Miller Rubber Company of California and the Miller Rubber Company of Ohio, to pay any costs that may be ultimately awarded against them.

If a bond is not given in accordance with this order, the goods on hand will remain until the final determination of the audit. The audit company shall allow the representative of the Miller Rubber Company of California access to the books at all times, not interfering with said audit.

An account shall also be taken by the audit company of all goods consigned by the Miller Rubber Company of Ohio to W. D. Newerf prior to July 1, 1914, and on hand on that date, and in the sale of said goods on hand July 1, 1914, and still on hand and held by the receiver or trustee, a separate account of the sales thereof shall be kept. The fund derived therefrom to be subject to the final determination of this Court as to whether the same belongs to W. D. Newerf, bankrupt, or the Miller Rubber Company of Ohio, and any collections of back accounts from sales made of consigned goods last aforesaid, shall be kept separate and distinct from collections from other goods of said bankrupt.

The audit company will also report separately and distinctly in reference to the accessories consigned

under the contract of June 11, 1914, and as to the method in which they were handled by the California Company and W. D. Newerf, Agent.

The bonding company must agree that if the money is not paid by the Miller Rubber Company of California within thirty (30) days after the final award shall be made against the rubber company, that a judgment may be entered for that amount against the bonding company.

AND IT IS FURTHER ORDERED that the hearing on said petitions shall be continued until the coming in of said account, April 6. 1915.

LYNN HELM,  
Referee in Bankruptcy."

[73] The Miller Rubber Company of California having filed a bond in the sum of \$20,000 with the American Surety Company of New York, as surety, conditioned as provided in the order last aforesaid, the receiver was ordered to comply with said order of April 6, 1915, in all respects. Subsequently there was segregated and delivered to the Miller Rubber Company of California, tires, tubes and accessories belonging to it, delivered to the bankrupt subsequent to the first of July, 1914, under the contract of June 11, 1914. Tires, tubes and accessories sold by the Miller Rubber Company of Ohio to the bankrupt prior to July 1, 1914, under the contract of November 6, 1911, of inventory list price value of the sum of \$7,685.23, together with a few accessories of nominal value, in Los Angeles, are being held by the trustee subject to the final order of the Court herein.

9. Pursuant to the order above made the W. C.

Mushet Audit Company, certified public accountants, made an exhaustive examination and report of the books and records of the W. D. Newerf Rubber Company and of the Miller Rubber Company of California, for the purpose of determining the inventory of tires, tubes and accessories on consignment from the Miller Rubber Company of Ohio with the bankrupt on July 1, 1914, sold and unsold, the amount of accounts in cash received by the Miller Rubber Company of Ohio on account of the consigned goods, an inventory of goods received from the Miller Rubber Company of California, sold or on hand, and the total amount owing to the Miller Rubber Company by the bankrupt, and the total amount due from the Miller Rubber Company to the bankrupt. The report of this audit company is filed herewith. As there were no exceptions filed to this report and the date therein set forth by either the Miller Rubber Company of Ohio, the Miller Rubber Company of California, or the receiver, the exact state of the accounts between the claimants herein and the bankrupt may be determined.

10. I find from the report filed that on the 1st day of [74] July, 1914, the bankrupt was indebted to the Miller Rubber Company of Ohio upon notes payable the sum of \$22,116.86, and upon open account payable July 1, 1914, \$12,749.09, a total of \$34,865.95. As the receiver is entitled to keep and retain the goods on hand July 1, 1914, amounting list price to \$7,685.23, together with the value of a few accessories to be ascertained, the indebtedness above mentioned from the bankrupt to the Miller Rubber

Company on that date should be increased by this sum of \$7,685.23, together with the value of said accessories, less a discount to which bankrupt was entitled under the contract of November 6, 1911, of 10-12 $\frac{1}{2}$ -12 $\frac{1}{2}$  and 5 per cent. Upon \$34,865.95 notes and account there has been paid since the first of July, 1914, \$8,304.33. It is also contended by the Miller Rubber Company of Ohio that the commissions due Newerf upon sales of goods for September and October, amounting to \$6,863.10, have been applied upon the open account. If they have been so applied they have been applied by authority of the bankrupt, who authorized them on November 12, 1914, to apply commissions due him on the open account (transcript 145) and the proof of claim by Miller Rubber Company of Ohio for the open account for goods on hand July 1, 1914, now retained by the trustee, amounting to a net sum of \$4,950.82, plus the net price of a few accessories on hand not specifically priced, will no doubt show such credits.

11. At all times since the first of July, 1914, it has been contended by the bankrupt, and is now contended by the receiver, that the Miller Rubber Company of California have not allowed the bankrupt full payment for his services as such agent, in that they did not allow him all the discounts and commissions which he was entitled to receive. It was provided in the contract of June 11, 1914, that the said bankrupt was to receive "in full payment for his services as such agent and in full payment of all salaries, rent, clerk hire and other expenses incurred by him, the difference between the price or prices at



[75] which goods are actually sold by said party of the second part and the prices of 10-12 $\frac{1}{2}$ -12 $\frac{1}{2}$ -5 per cent from the Miller Rubber Company's 1914 price list effective December 1, 1913, attached to said contract and made a part thereof." Miller tires are sold to customers upon terms of 5% discount cash, payable on or before the 10th day of the succeeding month. Price lists issued by the Miller Rubber Company to its dealers gave a list price with terms of 5% cash discount. This discount was given by the bankrupt as the agent of the Miller Rubber Company of California and as it was authorized by the Miller Rubber Company of Ohio. It was assumed in the first instance that in all cases the customer would take advantage of this offer, and it was given for the purpose of facilitating collections. If the customer did not take advantage of the offer a rebate was made to the agent. Accordingly the Miller Rubber Company of California in making the bankrupt allowance for his commissions deducted from the price list the 5% discount for cash, claiming that the goods were actually sold for this price, and then from that figure deducted the discounts provided for in the contract of 10-12 $\frac{1}{2}$ -12 $\frac{1}{2}$  and 5 per cent. The bankrupt's commissions, based upon this figure, would have amounted to \$12,-227.84. As against this the bankrupt claims that he should not be charged with this 5% discount allowed to purchasers of tires, but that the sale was actually at the list price without deducting the 5% for cash, and that his commissions should be figured upon the discounts allowed of 10-12 $\frac{1}{2}$ -12 $\frac{1}{2}$ -5 per cent from

list prices. Upon this basis there is a difference between the bankrupt and the Miller Rubber Company of \$4,495.25.

It is therefore for the Court to determine here which basis of calculation is correct. The Miller Rubber Company of California have allowed the bankrupt \$12,227.84 and the bankrupt claims that he is entitled in addition thereto to the sum of \$4,495.25 for which the receiver claims a lien upon the goods of the Miller Rubber Company of California in hand at the date of bankruptcy, [76] and that a judgment for that amount should be entered herein against the Miller Rubber Company of California and its bondsman aforesaid.

The question is whether goods are actually sold at list prices or at a price after deducting the discount of 5% allowed customers for cash. No authorities are presented to me as to what is the proper construction of this contract. As a matter of first impression it would appear that the price at which the goods were "actually sold" should be the price at which the article was quoted to the customer before the discount was allowed; that the selling price is the gross price and that the option given to the customer of taking advantage of a discount is not the actual selling price of the goods. For a time, at the inception of the contract, the Miller Rubber Company allowed the discounts upon the basis of the list price, but subsequently after the first of September put a different construction upon the contract and contended that the commissions to the bankrupt should only be figured upon the net

price finally paid by the customer. It seems to me that the first construction put upon the agreement was the correct one.

WHEREFORE, and as conclusions from the foregoing I find and recommend as follows:

**[Conclusions of Special Master.]**

I.

That the order entered by me allowing the Miller Rubber Company of California to join in the petition with the Miller Rubber Company of Ohio to reclaim the certain property hereinbefore referred to, should be approved and confirmed.

II.

That the order entered by me on the 6th day of April, 1915, hereinbefore set forth, as to the delivery of certain goods to the Miller Rubber Company of California, the selection and segregation thereof, impounding the goods of the Miller Rubber Company of Ohio, and the order directing the accounting between the Miller [77] Rubber Company of Ohio and the bankrupt and the Miller Rubber Company of California and the bankrupt, should in all respects be approved and confirmed.

III.

That the Miller Rubber Company of Ohio is not entitled to reclaim any of the tubes, casings or accessories sold by the Miller Rubber Company of Ohio to the bankrupt prior to the first day of July, 1914, and which still remain in the hands of the trustee and which were on hand at the time of the filing of the petition in bankruptcy, of the list price of \$7,685.23, and the accessories in addition thereto

in Los Angeles, the value of which has not been ascertained, but which are only of nominal value, but in lieu thereof the Miller Rubber Company of Ohio is entitled to a claim against the bankrupt for the sum of \$4,950.82, plus the nominal value, not yet ascertained, of other accessories in the hands of the trustee in bankruptcy and of the stock on hand with the bankrupt prior to the first day of July, 1915, this amount being the value of said goods at list prices less the discounts allowed said Newerf under the contract of November 6, 1911.

Against this claim the trustee will effect such commissions as were earned by W. D. Newerf from the Miller Rubber Company of California during the months of September and October, which have been applied upon that account by consent of the Miller Rubber Company of California and the said bankrupt, if any such there are.

#### IV.

All goods coming into the hands of the receiver or trustee shipped, delivered or consigned to W. D. Newerf, agent, by the Miller Rubber Company of California under the contract of June 11, 1914, and subsequent to the first day of July, 1914, are the property of the Miller Rubber Company of California and should if they have not already been delivered be delivered to said company.

#### [78] V.

The receiver or trustee in bankruptcy is entitled to recover from the Miller Rubber Company of California or its bondsman, the sum of \$4,495.25, the amount of commissions still due the bankrupt from



said Miller Rubber Company of California. Against this there is no effect whatsoever. There is no privity between the Miller Rubber Company of Ohio of the one part and the Miller Rubber Company of California and the bankrupt of the other part, and moneys were only applied by the Miller Rubber Company of California in settlement of the previous indebtedness due from the bankrupt to the Miller Rubber Company of Ohio, with the bankrupt's consent, prior to the 16th of November, 1914.

#### VI.

There has been no consent by the bankrupt to make any further application after that date. The Miller Rubber Company of California has also in its possession, and there should be a judgment against it therefor, the amount of \$269.98 collected by it subsequent to the 20th of November, 1914, and applied without authority upon the indebtedness of the Miller Rubber Company, and also within four months of the filing of the petition in bankruptcy herein, with full knowledge on the part of the Miller Rubber Company of Ohio and the Miller Rubber Company of California of the insolvency of said bankrupt, and with reasonable cause to believe that by the payment of said amount to the Miller Rubber Company of Ohio by the Miller Rubber Company of California the bankrupt was giving a preference.

#### VII.

The costs of this proceeding are not due to any fault of the general creditors or the receiver or trustee herein and all expenses of the segregation and delivery of the stock of merchandise owned by

the Miller Rubber Company of California as aforesaid together with the costs of this accounting are attributable to [79] the methods of business conducted by the Miller Rubber Company of Ohio, the Miller Rubber Company of California and the bankrupt. The Miller Rubber Companies should therefore bear the costs of this proceeding.

In making up the accounts and distributing the goods to the Miller Rubber Company of California the following expenses were incurred:

To Belle McGillivrey, shipping clerk.....	\$ 8.10
J. F. Roe, bookkeeper.....	8.34
J. E. Newerf, bookkeeper.....	25.00
W. W. Eakins, inventory and segregation of goods.....	150.00
T. P. Keogh, in segregation and distribution of goods.....	61.50
Mushet Audit Company in making auditor's report.....	789.80
	<hr/>
	\$1,042.74

The Miller Rubber Company of Ohio should pay the costs of segregating and holding the goods in warehouse which have been segregated under the contract of November 6, 1911, and which as hereinbefore stated have a list price value of \$7,685.23, the costs of which storage will have to be ascertained.

Inasmuch as the order of reference herein and nearly all of these proceedings were had prior to the adjudication in bankruptcy herein and prior to the general order of reference to the undersigned as referee, and were had before him as Special Master,

a reasonable allowance should be made to him for Master's fees herein, which should be taxed as costs.

In addition thereto should be taxed the stenographer's fee for reporter's transcript, on this hearing, amounting to \$164.60.

Respectfully submitted,

LYNN HELM,

Special Master.

July 13, 1915.

Filed July 13th, 1915, at 30 min. past 5 P. M.  
Wm. M. VanDyke, Clerk. Murray C. White,  
Deputy.

Filed July 13th, 1915, at — min. past 2 P. M.  
Lynn Helm, Referee. C. Meade, Clerk.

**Agreement [Dated November 6, 1911.]**

[80] THIS AGREEMENT by and between The Miller Rubber Company and The Prudential Rubber Company, both of Akron, Ohio, both corporations existing under the laws of the State of Ohio, as first parties, and W. D. Newerf Rubber Company of Los Angeles and San Francisco, California, as second party:

WITNESSETH: That in consideration of the sum of one dollar (\$1.00) and other valuable consideration by each party to the other paid, and the receipt of which is hereby acknowledged, the parties hereto agree as follows:

First. First parties agree to appoint second party their sole agent, and second party agrees to act for first parties in the capacity of agent in making sale of first parties' Automobile Tires and Tubes

for the States of California, Oregon, Washington, Idaho, Nevada, Arizona and British Columbia, and Hawaiian Islands.

Second. Second party agrees to maintain at its own expense an office and show-room at convenient location in the cities of Los Angeles and San Francisco, California.

Third. First parties agree to furnish to second party on consignment a stock of above goods manufactured by first parties for the purpose of supplying customers and prospective customers in the territory mentioned; the quantity of such stock to be at all times limited to a reasonable amount.

Fourth. Second party expressly agrees that all goods or stocks of goods so furnished by the first parties shall at all times be and remain the property of the first parties until sold and delivered to *bona fide* customers in the usual manner.

Fifth. Second party agrees to furnish first parties on the first of each month, a complete inventory of all goods belonging to first parties in the hands of second party; or if first parties desire, second party agrees to—at any time—permit first parties to have their representative take inventory of stock on hand.

[81] Sixth. It is understood and agreed that second party will make monthly settlements for all purchases from and all shortage in stock of first parties. Remittances to be mailed to first parties on the 10th of each month for previous month's sales.

Seventh. When desired by second party, four months' notes drawing interest at 5% will be ac-



cepted by first parties in settlement for all purchases made by second party from first parties, provided, however, that the total maximum of such notes shall not exceed twenty-five thousand dollars (\$25,000) at any one time during the first year of this contract, and that such maximum after the first year is to be subject to mutual agreement of both parties, but not less than twenty-five thousand dollars (\$25,000) unless credit of second party becomes impaired.

It is understood and agreed that all goods shall be delivered by first parties F. O. B. Los Angeles or San Francisco, California, or Seattle, Washington.

Ninth. It is further distinctly understood and agreed that second party shall, upon the expiration or termination of this agreement or any renewal thereof, or upon its abrogation as herein provided, surrender and turn over to first parties all the property belonging to first parties of whatsoever nature, and shall make full and complete settlement and accounting to first parties for all property that may have been entrusted to second party's custody by virtue of this agreement.

Tenth. Prices to second party from first parties to be as follows: Exhibit "A" attached hereto, prices on The Miller Rubber Company's Casings and Tubes less a discount of 10%, 5%, 5%, 5%, and 5% on Casings, and 10%, 5%, 5% and 5% on Tubes, and exhibit "B" attached hereto, prices on The Prudential Rubber Company's Casings less a discount of 10%, 5%, 5% and 5%.

Eleventh. It is further agreed that if any reduction in prices is made by first parties at any time

during the life of this agreement, that second party shall be entitled to a credit [82] from first parties for the amount of said reduction on all stock on hand at the time said reduction goes into effect.

Twelfth. It is agreed that first parties will always give to second party the lowest prices that first parties give to anyone for goods in any quantity, except for demonstrating or advertising purposes.

Thirteenth. When shipments are made from Akron, Ohio, by first parties to parties in the territory of second party, first parties will render a credit memorandum for the difference between the net amount realized for such sales and the net value of such goods charged at prices made second party by first parties.

Fourteenth. It is understood and agreed that all replacements only on Miller Tires and Tubes are to be wholly under the control of the first parties, but it is agreed that all replacements shall be made by second party, and that a compensation of 10% of amount received be paid by first parties to second party for handling such replacements. All replacements to be made from consigned stock of first parties and to be reported in writing by second party to first parties, provided, however, that first parties are to have the option of putting in their own adjuster if at any time the adjustments made by second party are not satisfactory to first parties.

Fifteenth. First parties agree to pay second party actual cost for repair work done only on Miller Tires and Tubes, necessary to be done to protect the interest of the first parties. The second party to

render invoices to the first parties for such repairs at time repairs are made.

Sixteenth. First parties agree to furnish second party free of charge all samples of Tires and accessories necessary, also advertising matter imprinted with name and address of second party.

Seventeenth. First parties agree to allow one-half of the expense of W. D. Newerf or his manager to the factory, Akron, Ohio, [83] at least once a year during life of this contract.

Eighteenth. It is further understood and agreed that this contract shall be and remain in force until the first day of November, 1916, unless sooner terminated by a written notice from either party to the other 90 days previous to said termination.

Nineteenth. It is further agreed that this contract shall continue for a further period of five years from the date of expiration above mentioned unless sooner terminated by notice as hereinbefore provided and until notice is given to either party by the other in writing at least 90 days prior to said specified date of expiration.

Twentieth. This agreement is not binding until signed by a duly authorized officer of the Miller Rubber Company and The Prudential Rubber Company, and by W. D. Newerf for the W. D. Newerf Rubber Company.

IN TESTIMONY WHEREOF the said parties have signed these presents in duplicate; each retaining a copy, this 6 day of Nov. 1911.

THE MILLER RUBBER COMPANY,

Per WM. F. PFEIFFER,

Secy. & Asst. Treas.

THE PRUDENTIAL RUBBER COMPANY,

Per F. C. MILLHOFF, Pres.

Parties of the First Part.

W. D. NEWERF RUBBER COMPANY,

Per W. D. NEWERF,

Party of the Second Part.

WITNESS: As to W. D. Newerf:

JNO. F. ROE.

**[Agreement, dated June 11, 1914.]**

[84] THIS AGREEMENT, entered into at Los Angeles, California, this 11th day of June, 1914, by and between The Miller Rubber Company of California, party of the first part, and W. D. Newerf of Los Angeles, California, party of the second part,

WITNESSETH: that

WHEREAS the party of the first part is a corporation organized and existing under and by virtue of the laws of the state of California, and is duly authorized to conduct business therein; and

WHEREAS, it is the desire of the party of the first part to employ party of the second part as its agent within and for the following territory; viz: the State of California, Oregon, Idaho, Washington, Nevada, Arizona, and in addition thereto British Columbia and the Hawaiian Islands, provided, however, that this provision shall be null and void as to any portion of the aforementioned territory providing the sales made by the party of the second part



do not, in the opinion of the party of the first part warrant the continuance of any portion of said territory, it being understood and agreed that sixty (60) days written notice by the first party to said second party of said first party's dissatisfaction with the sales made by the second party in any portion of said territory shall be sufficient to eliminate any portion of the aforementioned territory from this contract; and it is furthermore mutually agreed that such agency is, and shall be restricted to such matters as are in this agreement, and supplement thereof, set forth, the headquarters and office of the said agent to be at the cities of Los Angeles and San Francisco, California, under and pursuant to the terms and conditions incidental thereto, which party of the second part hereby accepts and agrees to perform.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, it is hereby agreed by and between the parties hereto that the party of the second part shall enter into the [85] employment of the party of the first part, within the territory hereinbefore specified, for the term of five (5) years.

That the said agency shall cover only the sale of automobile casings and tubes as manufactured by The Miller Rubber Company of Akron, Ohio, unless in express terms otherwise agreed.

That the main office of said agency shall be located at the city of Los Angeles, California.

That the party of the first part will place in stock in the city of Los Angeles, and San Francisco, a gen-

eral and assorted stock of automobile casings and tubes (the product of The Miller Rubber Company, of Akron, Ohio), and other products of the same manufacture, if mutually agreed upon, and keep and maintain the said stock equal to the net value of not less than Twenty Thousand Dollars (\$20,000) nor more than Sixty Thousand Dollars (\$60,000), according to the demand of the trade; said party of the second part agrees to provide a suitable place to store said stock of goods, and to protect the same from all damage, except such as may arise from deterioration by lapse of time.

Party of the first part agrees that on all freight shipments, goods shall be delivered by the first party F. O. B. Los Angeles or San Francisco, California, Portland, Oregon, or any point within territory allotted to said second party, where the freight rate does not exceed \$3.50 per hundred pounds, provided, however, that all shipments shall weigh one hundred pounds (100#) or more, otherwise said shipments shall be F. O. B. Akron, Ohio.

The party of the second part shall make sales from the said stock of casings and tubes to responsible purchasers and at prices not lower than 10, 12½ trade discount, and 5% additional for cash, from the 1914 price-list of The Miller Rubber Company of Akron, Ohio, a copy of which is hereto attached and marked exhibit "A," and made a part hereof, and dated as effective December 1st, 1913, subject to changes in said list [86] and discounts as hereinafter set forth, (and sales of other products at such prices as may be agreed upon from time to time);

and make collections upon all sales and deposit the funds from said sales in such depositary in Los Angeles and San Francisco, as the party of the first part may select, such funds to be deposited in the name of, and to the credit of The Miller Rubber Company of California, subject to the check of the Treasurer, or the duly authorized officer of The Miller Rubber Company of California, and said second party shall make a statement of said bank account to the party of the first part on the first day of each and every month commencing August 1st, 1914.

All sales from consigned stock shall be made in the name of The Miller Rubber Company of California, and shall be on terms of not to exceed thirty (30) days net, except in such cases as may otherwise, be mutually agreed upon in writing by said parties, and except as hereinafter provided.

Party of the second part shall receive in full payment for his services as such agent, and in full payment of all salaries, rent, clerk hire, and other expenses incurred by him, the difference between the price, or prices, at which goods are actually sold by said party of the second part, and the price of 10-12 $\frac{1}{2}$ -12 $\frac{1}{2}$ -5% from The Miller Rubber Company's 1914 price-list effective December 1st, 1913, a copy of which is hereto attached and marked exhibit "A," and made a part hereof, which prices and list are subject to change as hereinafter provided; it being understood that the party of the second part shall assume and pay all collection expense, and assume all losses for bad accounts; and said second party shall execute and deliver to first party

a bond or security of equal protection to first party, and to the approval of first party, in the sum of Twenty Thousand Dollars (\$20,000), guaranteeing the payment to it of all accounts for goods sold by second party, the liability on said bond or other security, to become fixed [87] at the option of first party as to each account, on failure to pay the same within sixty days after maturity, and the surety on said bond shall waive all notice of default in the payment of any account, and shall consent to any extension of time of payment thereof; and said bond shall further be conditioned to secure the safe-keeping and redelivery to first party of all stock so placed in the hands of second party, as hereinafter provided.

Party of the first part will forward, not later than the twelfth of each month, a check or draft covering second party's remuneration as hereinbefore specified.

Party of the second part shall have the right to consign casings and tubes, the property of The Miller Rubber Company of California, to such individuals, firms or corporations, as they may desire, the same, however, to be only with the approval of the party of the first part, and subject to the conditions which said party of the first part may set forth; it being understood and mutually agreeable, that second party shall hold himself responsible and liable at all times for the payment of materials sold by said consignment houses and also for the return of all material remaining unsold at the termination of such consignment.



Party of the second part hereby agrees to forward daily to the party of the first part, at such address as first party may designate, a full and complete report of all sales made during that day, and all duplicate deposit slips, duly certified by the designated depositary showing deposits for that day. Party of the second part also agrees to forward to the party of the first part at such address as first party may designate, on the first day of each and every month a full and complete report of all stock on hand, accounts receivable made in the name of the party of the first part, and unpaid, a total of any accounts which may be doubtful from a collection standpoint, assigned, in the hands of a Receiver, or Bankrupt. [88]

Party of the first part reserves the right to sell Miller casings and tubes direct to automobile manufacturers in the territory heretofore mentioned, and party of the second part is not entitled to any commissions or profits on such business. Party of the first part also reserves the right to sell casings and tubes manufactured by The Miller Rubber Company of Akron, Ohio, which may be special in their nature, and different in their quality or construction from said The Miller Rubber Company's standard product, the pneumatic automobile casings and tubes, and said party of the second part is not entitled to any commissions or profits on such business.

Party of the first part reserves the right to change at its option, all price-lists and discounts aforementioned, but it agrees to advise the party

of the second part immediately when any changes are made. Provided, however, that the net difference between The Miller Rubber Company's prevailing special dealer's price, and the price on which second party's compensation is figured, shall be not less than 10%.

Party of the second part hereby agrees to make contracts for clerk hire and rentals, and all other expense in his own name, and assumes and agrees to pay the same, and agrees to hold the party of the first part free from all liability for such expense.

It is understood and agreed between the parties hereto that all adjustments and replacements on Miller tires and tubes are to be wholly under the contract of the party of the first part and the decision of said party of the first part relative to any and all adjustments and replacements, shall be final; but it is further agreed that all adjustments and replacements shall be made by the party of the second part on such basis, and under such conditions, as the party of the first part may establish, and that a compensation of ten per cent (10%) of the amount of cash received from the sale of the replacing tire shall be [89] paid by the party of the first part to the party of the second part for the handling of such replacements. All adjustments and replacements are to be made from consigned stock of the party of the first part, and to be reported in writing by party of the second part to party of the first part. The party of the first part shall, however, have the option of putting in its own adjuster, if, at any time, the adjustments made by

party of the second part are not satisfactory to the party of the first part, or for any other person.

In the event an adjustment is due the customer because of a defective casing or tube, it is mutually understood and agreed that if it is advantageous to the party of the first part that casings or tubes shall be repaired by the second party rather than replaced, that said second party shall make such necessary repairs and charge the party of the first part for same at prices not to exceed those prices set forth in exhibit "B" attached hereto and made a part hereof; and further that the following schedule shall apply to charges of first party for retreading:

1500 miles or less, retread free of charge to customer.

1750 miles, customer shall pay one-third of prices listed on exhibit "B."

2000 miles, customer shall pay one-half of prices listed on exhibit "B."

2500 miles, customer shall pay two-thirds of prices listed on exhibit "B."

and no casings are to be retreated at first party's expense that have given over 2500 miles of service; provided, however, that this privilege of making repairs shall be wholly under the control of first party at all times, and shall be restricted in its scope and prices changed by first party at first party's option, and without prior notice to that effect.

Party of the first part agrees to furnish advertising matter such as they may have, free of charge, and to co-operate [90] with the party of the sec-

ond part in bringing Miller tires to the attention of the car owners in the territory mentioned herein, by mailing from time to time circular letters and other matter direct to the automobile owners, as party of the first part may deem advisable to stimulate business.

Party of the first part will allow at least one hundred dollars (\$100) per month to party of the second part for advertising purposes.

Said second party agrees in consideration of the premises, to devote his whole time and best efforts for said period of five (5) years to the work herein contemplated, with the exception of such times as may be necessary to devote to the management of W. D. Newerf Company.

The within contract shall take effect on the 1st day of July, 1914, and expires on the 1st day of July, 1919, unless sooner terminated.

At the termination of this contract for any reason whatsoever, and unless in express terms renewed, party of the second part agrees to deliver to the order of the party of the first part, or to return to Akron, Ohio, free of all charges, all consigned stock not paid for, it being mutually agreed, however, that should said termination be due to the cancellation of contract at the instigation of the party of the first part, that cartage or transportation charges incurred, by reason of their carriage to such point as may be designated by party of the first part, shall be paid by said party of the first part.

This contract may be cancelled by either party



upon ninety (90) days written notice to that effect, one to the other.

This agreement is not binding until signed by a duly authorized officer of The Miller Rubber Company of California, and by W. D. Newerf.

This contract and supplement shall supersede all contracts, agreements or understandings of any nature now existent between [91] The Miller Rubber Company, or the Miller Rubber Company of California, and W. D. Newerf Rubber Company or W. D. Newerf, and such contracts, agreements, and understandings shall be, and are considered null and void, except as to the unpaid accounts.

IN WITNESS WHEREOF the parties hereto have hereunto affixed their signatures, and said corporation its seal, the day and year first above written.

Witnesses:

CLAUDE M. BUT-      THE MILLER RUB-  
LER to                      BER CO. OF CAL.

By WM. F. PFEIFFER,

Sec'y.

W. D. NEWERF.

Party of the first part agrees to allow one-half of the expense of W. D. Newerf, or his Manager, to the factory at Akron, Ohio, for at least once a year, during the life of this contract.

The above clause is hereby made a part of contract entered into under date of June 11th, 1914, by and between the Miller Rubber Company of California, party of the first part, and W. D. Newerf of Los

Angeles, California, party of the second part.

Witnesses:

CLAUDE M. BUT- THE MILLER RUB-  
LER to BER CO. OF CAL.

By WM. F. PFEIFFER,

Sec'y.

W. D. NEWERF.

**[Supplemental Agreement, Dated June 11, 1914.]**

**[92]** SUPPLEMENTING AGREEMENT entered into under date of June 11th, 1914, by and between The Miller Rubber Company of California, party of the first part, and W. D. Newerf of Los Angeles, California, party of the second part.

WITNESSETH: That

WHEREAS party of the first part has employed said party of the second as its selling agent for automobile casings and tubes in certain specified territory, and under certain conditions as set forth in contract between said parties, and dated June 11th, 1914, and

WHEREAS it seems desirable and advantageous to both parties that the same arrangement with certain exceptions shall be made and applied to the handling of automobile repair materials and automobile tire accessories;

NOW THEREFORE, it is mutually agreed:

First. That automobile tire repair materials, and automobile tire accessories, shall be handled in the same manner as is contemplated with regard to casings and tubes in said contract of June 11th, 1914, and that all of said contract except as to the basis on which sales shall be made, shall apply to auto-

mobile tire repair materials and automobile tire accessories, the same as if said repair materials and accessories had been originally included in said contract.

Second. That the compensation to said second party for the fulfillment of that part of this contract shall be the difference between the prices at which sales are actually made to their customers, and the prices on attached sheet marked exhibit "C." Party of the first part reserves the right to change their list prices and discounts at any time, and agrees to notify said party of the second part immediately of such action.

Third. That the party of the second part shall have the right under this contract to make sales of automobile tires, repair [93] materials and tire accessories in the territory specified in the original contract, such right to be exclusive as to territory except as hereinafter provided. However, party of the second part agrees to handle the aforementioned materials and accessories to the exclusion of all competitive goods. Provided, further, however, that the party of the first part reserves the right to sell any and all concerns located in the territory granted as exclusive in the original contract, and to which this is a supplement, if the party of the second part is for any reason, unable to do so, but first party agrees to pay to the party of the second part the difference in price or prices between the actual sales price to the customer, and the prices at which the materials sold would have been charged to the said second party; and be it pro-

vied, further, that the party of the first part shall reserve the right to make sales of fabrics and other materials under this supplement direct to manufacturers of reliners and blow-out patches, and that no commission shall accrue to second party for sales of fabrics and other materials sold to manufactures of reliners and blow-out patches, unless such sales are actually made by the second party, and at an advance over the minimum price or prices listed on the attached exhibit "C."

Fourth. Furthermore, this supplement may be cancelled at any time by either party on ninety (90) days' written notice, one to the other.

In testimony whereof we have this 11th day of June, 1914, set our hands and seals at Los Angeles, California.

Witnesses:

CLAUDE M. BUT- THE MILLER RUB-  
LER to BER COMPANY OF  
CAL.

By WM. F. PFEIFFER,  
Secy.  
W. D. NEWERF.

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**[94] Order of Reference.**

(Caption.)

**IN BANKRUPTCY.**

In the Matter of WILLIAM D. NEWERF,

Bankrupt.

WHEREAS William D. Newerf, of Los Angeles, in the county of Los Angeles, District aforesaid on the 9th day of April, A. D., 1915, was duly adjudged



a bankrupt upon the petition filed in this court against him on the 19th day of March, A. D. 1915, according to the provisions and acts of Congress relating to bankruptcy.

It is thereupon ordered that said matter be referred to Lynn Helm, Esq., one of the referees in bankruptcy, who is ordered to take such further proceedings therein as are required by said acts, and that the said W. D. Newerf shall attend before said referee on the 14th day of April, 1915, at his office in Los Angeles at 2 P. M. and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said involuntary bankruptcy.

(Signed) BLEDSOE,  
Judge.

WITNESS the Hon. BENJAMIN F. BLEDSOE,  
Judge of the said District Court and the seal thereto,  
at Los Angeles, this 9th day of April, A. D. 1915.

WM. M. VAN DYKE.

By Murray,  
Deputy Clerk.

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[95] (Caption.)

**Notice to Take Depositions [of C. Douglas Lane  
et al.].**

To Norman A. Bailie and Dave F. Smith, Attorneys  
for Trustee:

To Citizens Trust & Savings Bank, Trustee:

Please take notice that The Miller Rubber Com-

pany of California and The Miller Rubber Company of Akron, Ohio, will take the depositions of C. Douglas Lane, Bookkeeper of The Miller Rubber Company of California; Thomas D. Pierson, Cashier of said company; F. B. Theiss, Treasurer of said Company, and C. M. Butler before A. R. Doak, Notary Public, at 1247 South High Street, City of Akron, County of Summitt, State of Ohio, on Wednesday, July 28th, 1915, at 10 o'clock A. M., and the said depositions when taken will be read in evidence on behalf of the aforesaid companies upon their petition to recover certain goods, wares, and merchandise, accounts receivable, books, documents, etc. in the above-entitled matter. That the taking of said depositions will be continued from day to day until fully taken and completed.

Dated Los Angeles, California, District aforesaid, this 6th day of July, 1915.

BICKSLER, SMITH & PARKE,  
Attorneys for the Miller Rubber Co., Attorneys for  
The Miller Rubber Co. of California.

**[Objection to Taking of Depositions.]**

[Endorsed on Original:]

“Objection is hereby made to the taking of these depositions for the reason that the case is closed.

NORMAN A. BAILIE,  
One of the Attorneys for Trustee.”

[96]    (Caption.)

**Affidavit [of W. C. Smith] in re Depositions and  
Proof of Claim of the Miller Rubber Company  
et al.**

W. C. Smith, being first duly sworn deposes and says that he is one of the attorneys of record for The Miller Rubber Company and The Miller Rubber Company of California, petitioners herein for certain personal property; that on or about the — day of April, 1915, Mr. Norman A. Bailie of counsel for the trustee in bankruptcy herein, was duly served with notice pursuant to the United States statutes in such case made and provided, that depositions on behalf of The Miller Rubber Company and The Miller Rubber Company of California would be taken at Akron, Ohio, in due time thereafter according to law; that at the date of serving said notice to take depositions as aforesaid, a proceeding was pending for the audit of the books of the said W. D. Newerf to determine if possible the status of the accounts between The Miller Rubber Company and W. D. Newerf; that said Norman A. Bailie suggested and requested affiant as one of counsel for The Miller Rubber Company and The Miller Rubber Company of California, not to take said depositions at said time but to await the result of the audit of said books as aforesaid as it might, and probably would, save needless costs and expenses in the taking of said depositions and in having said trustee employ an attorney at Akron, Ohio, to examine and cross-examine said witnesses on behalf of the trustee; that

affiant therefore stated to the said Norman A. Bailie that the depositions would not be taken at said time, and that no further action need be taken at that time; that the audit of the books was duly taken and reported, and objections were duly made and entered by Bicksler & Smith as counsel for The Miller Rubber Company and The Miller Rubber Company of California, to said audit in certain respects, and that a hearing was had thereon. That the only matters at issue at said time seemed to be the right of The Miller Rubber Company [97] to recover property alleged to be on hand under a contract between The Miller Rubber Company and the said W. D. Newerf, known as the contract of 1911, and also the issue as to the alleged amount of commissions owing by The Miller Rubber Company of California to the said W. D. Newerf, and at the close of said hearing upon the return of said audit of the books of said W. D. Newerf, one of the auditors thereof stated that the amount owing by the said The Miller Rubber Company of California was and is \$1,284.41; that said case was not closed on said date, and the following morning another page to and of said audit was prepared by the said Mushet Audit Company as affiant understands, and it was then shown by said account that there was due to the said W. D. Newerf from The Miller Rubber Company of California about \$4,653.10; that thereupon a further hearing was had upon the questions and issues involved in said case, and a tentative showing was made that the claim of The Miller Rubber Company was wholly confined to its proof of claim as evidenced by certain



notes in the sum of about \$26,717.23, and that, therefore, certain commissions of about \$3,000 alleged to have accrued to the said W. D. Newerf during September and October, 1914, from The Miller Rubber Company of California, *and* not been credited by The Miller Rubber Company on the amount of the claim or notes owing by the said W. D. Newerf to The Miller Rubber Company; that the same day it was ascertained by telegram from the Miller Rubber Company at its home office at Akron, Ohio, that the said sum of about \$3,000 had been duly credited to the said W. D. Newerf on the books of The Miller Rubber Company pursuant to the agreement by and between said Company and the said W. D. Newerf, and that, therefore, affiant says, it would follow that the greatest amount that would be due to the said W. D. Newerf from The Miller Rubber Company of California would be \$1,507.91.

That there was a further matter in issue, to wit, a claim by the said W. D. Newerf's trustee in bankruptcy that the said [98] W. D. Newerf was, and is entitled to a credit of certain expenses advertising and repairs, for and on behalf of The Miller Rubber Company of California in the sum of \$1,613.12, and it was consistently claimed by The Miller Rubber Company and The Miller Rubber Company of California, at the last hearing before the Special Master, that part of said alleged sum of \$1,613.12 arose under the contract of 1911, between The Miller Rubber Company and the said W. D. Newerf, and that so much thereof as would be shown in the testimony to have arisen under the contract

of 1911, would be a set-off to the proven claim of The Miller Rubber Company instead of being a proposition for a cash payment by The Miller Rubber Company of California to the trustee in bankruptcy of the said W. D. Newerf as arising under the contract of 1914, between The Miller Rubber Company of California and the said W. D. Newerf; that affiant stated to the Special Master at said last hearing, that it would be necessary to take depositions to finally and fully settle the questions and the issues between the parties, and especially with reference to the last item aforesaid, to wit, the repairs and advertising, and that again the said Norman A. Bailie suggested to affiant that we should let that matter rest and that we would be able to settle "this law suit" promptly and without difficulty; but that when affiant saw the said Norman A. Bailie the following day he claimed that there was on hand under the 1911 contract, goods to the amount and value of \$4,000 and that the question remained of the \$1613.12 and some other matters at issue, which showed a difference between the parties of about \$6,000. That affiant learned that the Special Master had made up his mind as to the issues, and is informed by his partner that the Special Master refused to consider further testimony in spite of the statements of affiant in reference to the taking of depositions, and to finally determine the issues, and that said Special Master proceeded to, and did, render and file his opinion and findings. [99] That The Miller Rubber Company and The Miller Rubber Company of California have been wholly misled by the statement of counsel asking and re-

questing that *we not* take depositions, and have suffered great financial loss by being unable to fully establish its and their case by evidence.

That accordingly on or about the 10th day of July, 1915, notice was duly served on counsel for trustee herein that the depositions of certain persons on behalf of The Miller Rubber Company and The Miller Rubber Company of California will be taken at Akron, Ohio, July 28th, 1915, for the purpose of establishing the rights of the said company to the personal property, and proving the issues as to the commissions alleged to be due as aforesaid by The Miller Rubber Company of California to the said W. D. Newerf, and without said depositions being received in evidence that the said claimant companies will suffer great and irreparable loss.

#### PROOF OF CLAIM.

Affiant further says that certain objections were filed to the proof of claim of The Miller Rubber Company, said objections among other things referring to an alleged preference which it is claimed The Miller Rubber Company obtained, in the sum of \$269.98; that affiant is not cognizant of any evidence having been offered, or received in evidence, concerning said alleged preference, and says that the issue in relation thereto is not brought into question, but at the hearing of the aforesaid issues between said parties that it was understood that the issue thereto in relation to said alleged preference was reserved to be determined at the hearing of all of said objections to the claims of The Miller Rubber Company, and not otherwise; that notwithstanding the

objections to said claim the referee has not required the trustee in bankruptcy, nor its counsel, to proceed with the hearing of the objections to said claim, and the objections thereto have never been heard, and the proof of claim of the said The Miller Rubber Company has never been allowed. [100] Although the trustee has ample funds on hand to pay the first dividend of 5% on said claim, to wit: about \$1,300, the same has not been paid, and the referee has now gone on his vacation for some weeks.

1911 CONTRACT ENDED.

Attempted Sale of Property.

Affiant further says that the attorneys for the trustee herein were about to arrange for the sale of the property on hand under the 1911 contract, and claimed in these proceedings by The Miller Rubber Company; that the attempted sale thereof was upon the ground that the property was, and is owned by he said W. D. Newerf, bankrupt; and affiant's firm were forced into court with their client, The Miller Rubber Company, before the Special Master herein to obtain the order which is a part of the report of the Special Master herein, refusing and forbidding the sale of said property until these proceedings are determined; that the trustee herein has made no attempt, nor offered to carry on, nor continue said contract of 1911, in any manner or form, and that all complaints, repairs and replacements have been made to and by The Miller Rubber Company, and not otherwise, if at all.

WHEREFORE, affiant asks on behalf of The Miller Rubber Company and The Miller Rubber Com-



pany of California that the matters and issues between the said companies and the trustee in bankruptcy of the said W. D. Newerf be referred to the Special Master for determination after the said depositions shall have been filed herein, and that said Special Master report to this Court his proceedings thereunder after said depositions are read into the record; that report of the Special Master be set aside; and for all other and further relief to which said claimants may be found entitled.

W. C. SMITH.

Filed July 29th, 1915, at 35 min. past 10 o'clock  
A. M. W. M. Van Dyke, Clerk. By Murray C.  
White, Deputy

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[101] (Caption.)

**Affidavit [of C. R. Wetsel] in re Depositions and  
Claim of the Miller Rubber Company et al.**

C R. Wetsel, being first duly sworn deposes and says: That he is the duly authorized agent of The Miller Rubber Company and The Miller Rubber of California for Southern California, with full power of attorney therefor:

**FACTS IN RE TAKING OF DEPOSITIONS.**

Affiant deposes and says that he recalls that W. C. Smith, one of counsel of record for The Miller Rubber Company and The Miller Rubber Company of California, specifically stated to the Special Master herein that it would be necessary to take depositions to fully and finally determine the matters under consideration; and especially to determine when the

the goods were shipped which go to make up the items of \$1,613.12 alleged to be due to the said W. D. Newerf, bankrupt, from The Miller Rubber Company of California for repairs and advertising.

That the claimants herein did not, at any time formally, or at all, or in any wise, close their case, but left it open and reserved the right to take depositions accordingly.

#### WHAT THE DEPOSITIONS WILL SHOW.

That the depositions to be taken herein will show substantially the following facts:

1. That the real party in interest herein is The Miller Rubber Company, and that all personal property, bills and notes receivable, and money handled by The Miller Rubber Company of California, at all times herein was and is the property of The Miller Rubber Company, and not otherwise.

2. That because the said W. D. Newerf, bankrupt, at all times understood and knew that the real party in interest was and is The Miller Rubber Company, and the owner of all the personal property involved in the said agency of the said W. D. [102] Newerf in his contract with The Miller Rubber Company and The Miller Rubber Company of California, that a right of mutual set-off has at all times existed for the proper and ultimate determination of the questions at issue between the parties herein, and for the proper and ultimate determination of the rights of the parties as to the exact and correct amount due to The Miller Rubber Company from the said W. D. Newerf.

3. The Miller Rubber Company of California was

organized solely for the purpose of acting as agent for and on behalf of The Miller Rubber Company in the handling of its rubber goods, supplies and accessories, within the State of California, and for no other purpose.

4. That at all times during the existence of the contracts by and between W. D. Newerf and The Miller Rubber Company and The Miller Rubber Company of California, that but one set of books were kept by the claimants, herein, to wit; that of The Miller Rubber Company, and that the depositions herein will show the correct status of the accounts between the claimants and the said W. D. Newerf as hereinafter set forth.

5. That no set of books is kept for and on behalf of The Miller Rubber Company of California; but that all merchandise, accounts, bills and notes receivable, and all matters pertaining thereto, whether debits, credits, set-offs, counterclaims, or otherwise, existing under all contracts by The Miller Rubber Company of California are entered only on the books of The Miller Rubber Company.

6. That the said W. D. Newerf, bankrupt, knew and understood, and contracted with the understanding, that he was, at all times dealing with The Miller Rubber Company of California as agent of, and that the real party in interest was, and is, The Miller Rubber Company.

7. That while the said W. D. Newerf did, in a communication or communications introduced in evidence, and which are in [103] evidence herein, object to the method of The Miller Rubber Company

of figuring commissions and the amount due thereon to the said W. D. Newerf, that he did in reality adopt the method of The Miller Rubber Company of figuring commissions, to wit, by crediting the said W. D. Newerf with commissions based upon the amount of money actually received in payment or settlement of accounts under and by virtue of his agency of The Miller Rubber Company and The Miller Rubber Company of California.

8. That of the \$1,613.12 alleged to be due and owing by The Miller Rubber Company of California to the said W. D. Newerf, bankrupt, approximately \$1,000 was, and is properly chargeable to the contract of 1911, only.

9. That the balance due to The Miller Rubber Company from the bankrupt herein, or his trustee in bankruptcy, is \$26,717.23, after deducting all credits and set-offs that were, or are, or could possibly be due in any manner to the said W. D. Newerf.

10. That because The Miller Rubber Company is the real party in interest, and that The Miller Rubber Company of California is agent, only, for and on behalf of said The Miller Rubber Company, that, therefore, no money or commissions are due to the said W. D. Newerf, or his trustee in bankruptcy from The Miller Rubber Company of California.

11. That in addition to the claim of The Miller Rubber Company, being \$26,717.23, the property on hand under the contract of 1911, between The Miller Rubber Company and the said W. D. Newerf, bankrupt, at all times herein was, and now is the property of the Miller Rubber Company, and that the contract



of 1911 was entered into by and between The Miller Rubber Company and the said W. D. Newerf, bankrupt, in entire good faith.

12. That all commissions for September and October, 1914, have been duly credited to the said W. D. Newerf, and also for any and all months after July 1st, 1914, as a mutual set-off to [104] all claims made by the said W. D. Newerf, bankrupt, of any sums alleged to be due and owing to him from The Miller Rubber Company, or The Miller Rubber Company of California, on the books of The Miller Rubber Company.

#### OBJECTIONS TO AUDITOR'S REPORT.

Affiant further says that he distinctly remembers that W. C. Smith, one of counsel of record for The Miller Rubber Company and The Miller Rubber Company of California, objected to the report and audit of The Mushet Audit Company filed herein, upon substantially these grounds:

a. Objected to the report and suggestion by said audit company that \$269.98, heretofore paid to The Miller Rubber Company by the said W. D. Newerf, bankrupt, should be returned to his trustee in bankruptcy as being a preference, the objection being upon the ground that no evidence had been offered or received to in any wise indicate that The Miller Rubber Company or The Miller Rubber Company of California knew, or had any information or belief, that the said W. D. Newerf was bankrupt at the time said sum was paid.

b. That counsel for claimants further objected to the method of computing the commissions, said

audit company having adopted the method of computing commissions by the said W. D. Newerf, the difference therein amounting to about \$4,495.25.

c. Said counsel further objected to said report because it was *résumé* of the figures given by the said W. D. Newerf, bankrupt, only excepting upon the figures submitted by affiant as to commissions alleged to be due to said W. D. Newerf.

That one of the auditors of the Mushet Audit Company stated at the close of the hearing upon the return of the audit of the books of the said W. D. Newerf, that the amount owing The Miller Rubber Company of California to W. D. Newerf was, and is \$1,281.41, and that a day or two thereafter an additional sheet of said audit was made by the said Mushet Audit Company showing that there was due to W. D. Newerf from The Miller Rubber Company [105] about \$4,653.10.

And further deponent saith not.

(Sig.) C. R. WETSEL,

(Verified.)

Filed July 29th, 1915, at 35 min. past 10 o'clock,  
A. M. Wm. M. Van Dyke, Clerk. Murray C.  
White, Deputy.

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[106] (Caption.)

**Affidavit of Norman A. Bailie in re Depositions.**

United States of America,  
Southern District of California,  
Southern Division,  
County of Los Angeles,—ss.

Norman A. Bailie, being sworn, deposes and says:

That he is one of the attorneys for the trustee in the above-entitled matter, and that he is the Norman A. Bailie named in the affidavit of W. C. Smith, on motion to receive in evidence the depositions of C. Douglas Lane, Thomas D. Pierson, F. B. Theiss and C. M. Butler. Affiant states that while this matter was being heard before Honorable Lynn Helm, as Special Master, to wit, on the 7th day of April, 1915, Messrs. Bicksler & Smith, Attorneys for the Miller Rubber Company and the Miller Rubber Company of California, served affiant with a Notice of the Taking of the Depositions of William F. Pfeiffer, T. D. Pierson, and P. C. Collette. That at the time said notice was served the trial was in progress and affiant stated to said W. C. Smith that if he (Smith) waited for a short time, it might not be necessary to take any depositions. That afterwards said William F. Pfeiffer, one of the witnesses named in said notice, came to Los Angeles and his deposition was taken in this proceeding. That nothing more was said with regard to the taking of said depositions until nearly a month after the case had been closed, and all the testimony, both oral and documentary on behalf of the trustee herein and The Miller Rubber Company and The Miller Rubber Company of California had been introduced, and until after the Special Master had announced that he was ready to render his decision.

That on the 6th day of July, 1915, affiant was served with a notice of the taking of the depositions of C. Douglas Lane, Thomas D. Pierson, F. D. Theiss and C. M. Butler; that [107] affiant refused to

accept service of said notice on the ground that the case was then closed; that in fact the depositions of none of the witnesses named in the notice served on affiant on the 7th day of April, 1915, were ever taken except the deposition of William F. Pfeiffer, taken in Los Angeles, as aforesaid.

NORMAN A. BAILIE.

Subscribed and sworn to before me this 9th day of November, 1915.

[Seal]

LOIS DUNLAP,

Notary Public in and for the County of Los Angeles,  
State of California.

Filed November 15th, 1915. Wm. M. Van Dyke,  
Clerk. By Charles N. Williams, Deputy Clerk.

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[108] (Caption.)

**Exceptions to Report of Special Master.**

Now comes the Miller Rubber Company, a corporation, and the Miller Rubber Company of California, a corporation, and make the following objections and exceptions to the opinion and report of said Special Master, and to the findings of fact, conclusions of law and recommendations of said Special Master, as follows:

I.

We except to the findings and report of the Special Master in his determination that the contract of November 6th, 1911, referred to in finding 1, page 1, is still in force, for these reasons:

(a) The contract as of date June 11th, 1914, between the Miller Rubber Company of California and



W. D. Newerf, superseded said contract of November 6th, 1911, above referred to.

(b) In any event, the bankruptcy of said W. D. Newerf would, and did abrogate and terminate the said contract of November 6th, 1911.

(c) The trustee in bankruptcy of the said W. D. Newerf took possession of the property remaining on hand and held under said contract of November 6th, 1911, and attempted to administer and sell the same without any attempt to fulfill and perform the said contract, and thus terminated it.

## II.

We except to the findings and report of the Special Master in finding that the Miller Rubber Company of California is not only a distinct entity, but in all respects must be treated as such in its dealings with the bankrupt, for the reason that all of the property involved herein was owned by and is the property of the Miller Rubber Company, and that said two companies have been at all times treated as one company by the bankrupt, as shown more fully by the undisputed evidence of the proceedings herein.

## [109] III.

We except to the findings and report of the Special Master in finding six, page 4, *et seq.*, that all goods shipped by the Miller Rubber Company of Ohio to Newerf under contract of November 6th, 1911, became the property of the bankrupt's estate, and as such, passes to the trustees in bankruptcy, for the reason that the contract of November 6th, 1911, specially reserved title in and to each and all of said property shipped thereunder to the bankrupt, in the

Miller Rubber Company; and that there is not a scintilla of evidence, nor any inference which shows the said contract of November 6th, 1911, or any portion or part thereof, was, or is, in fraud of the rights of the bankrupt, or of any of his creditors.

#### IV.

We except to the findings and report of the Special Master in finding nine, pages 17 and 18, of said report in finding that no exceptions were filed to the report of the Mushet Audit Company, and we now refer to the stenographic record of this case for the exceptions and objections which the claimants did, and do now make, which among others, were as follows:

(a) The suggestions and findings by said audit company that \$269.98 should be returned by the Miller Rubber Company to the trustee in bankruptcy of W. D. Newerf, upon the ground that it was a preference.

(b) To the methods employed by the Mushet Audit Company in computing the commissions, and to said company's audit in its general résumé and recapitulation taking "Newerf's view" of commissions, and also of the general business dealings between him and the claimants herein, instead of making a report of the facts.

#### V.

We except to the findings and report of the Special Master in finding ten, page 18, in finding:

[110] (a) That the receiver was entitled to hold the goods shipped prior to July 1st, 1914, or on hand at said date, alleged to amount to \$7,685.23,

or the value of any accessories, or of any other property.

(b) In the figures adduced and set forth in said findings upon the ground that the same are incorrect and not consistent with the facts, and which are more fully set forth in the auditor's report, and depositions to be filed herein.

## VI.

We except to the findings and report of the Special Master in finding eleven, page 20, in finding that for a time, or any time, the Miller Rubber Company allowed discounts upon the basis of the list price, and that it subsequently after the 1st of September, 1914, put a different construction thereon, for the reason that the true construction and meaning of said contract as determined by the Miller Rubber Company and W. D. Newerf was, and is, that his commissions, in full, should be "the difference between the price, or prices, at which goods are actually sold by said party of the second part,—Newerf—and 10—12½—12½—5 per cent from the Miller Rubber Co.'s 1914 price list," and that the price "at which goods are actually sold" was interpreted by the parties herein to be the amount of money actually received by the said W. D. Newerf in payment of settlement for goods sold, and not otherwise.

## VII.

We except to the findings and report of the Special Master in paragraph 111, page 21, in this finding that the Miller Rubber Company of Ohio, is not entitled to claim any of the tubes, casings, or

accessories alleged to have been sold by the Miller Rubber Company of Ohio, to the bankrupt prior to July 1st, 1914, for the reason that all said goods were and now are, the property of The Miller Rubber Company, and not otherwise, and also in holding that because of said findings, the Miller Rubber Company of Ohio [111] is entitled to prove its claim for \$4,950.82 for said tubes, casings and accessories alleged to have been so sold by the Miller Rubber Company of Ohio to bankrupt, and also, and that because thereof, the commissions earned by the said W. D. Newerf from the Miller Rubber Company of California may be applied against said alleged proof of claim for \$4,950.82.

### VIII.

We except to the findings and report of the Special Master in finding five, page 22,

(a) That the receiver or trustee in bankruptcy *are* entitled to recover the sum of \$4,495.25, or any other sum, alleged to be the amount of commissions still due the bankrupt from the Miller Rubber Company of California, upon the ground that there is nothing due, owing or payable from the Miller Rubber Company of California, to the receiver or trustee in bankruptcy herein, and especially because the basis of the commissions due to W. D. Newerf have been incorrectly stated and figured by the Mushet Audit Company and by the Special Master herein, as hereinbefore set forth, and also because all property, accounts, claims and notes at all times herein have been, and now are the property of the Miller Rubber Company of Ohio, and at all times herein, it



has been so understood and agreed by and between the Miller Rubber Company, the Miller Rubber Company of California, and the said W. D. Newerf.

(b) We except to the findings of the Special Master upon the ground that all property, claims, demands and notes belong to, and are the property of the Miller Rubber Company, and that the said W. D. Newerf transacted all his business with the full knowledge that the Miller Rubber Company was, and is the real party in interest, and with which he was in reality transacting business, and that therefore, the Miller Rubber Company is entitled to a mutual set-off of all alleged claims and demands, whether by commission or otherwise, made by the said W. D. Newerf [112] or his trustee in bankruptcy, as against the claims, demands and notes of the Miller Rubber Company in the bankruptcy proceedings herein, as more fully set forth in the recapitulation by the Mushet Audit Company in its report, wherein it shows that the Miller Rubber Company and the Miller Rubber Company of California are in reality one company, and sets forth in its report the mutual credits and set-offs.

(c) And we further except to the findings of the Special Master that there is no privity between the Miller Rubber Company of Ohio and the Miller Rubber Company of California, and the bankrupt, more fully set forth under exception (a) herein.

#### IX.

We except to the findings and report of the Special Master in finding six, pages 22 and 23, in holding that:

(a) No consent was given by the bankrupt to make application of commissions to November 16th, 1914, as against the amount owing by him on open account, or notes, to the Miller Rubber Company of Ohio.

(b) That the Miller Rubber Company should repay \$269.98 or any other sum, collected since November 20th, 1914, as a preference, on the ground that there is not a scintilla of evidence, and no inference from any evidence adduced, that the Miller Rubber Company or the Miller Rubber Company of California, had any information or belief, in any manner or form, that the said W. D. Newerf was bankrupt or insolvent at the time said sum was paid by the said W. D. Newerf, and further that the question of whether the sum of \$269.98 was a preference under the bankrupt law was not considered in any manner or form before the Special Master, nor was any evidence bearing thereon, and was reserved for an exception by the trustee in bankruptcy to the proof of claim by the Miller Rubber Company of Ohio, and has not yet been considered, and because thereof, and of their exceptions and objections to said proof of claim by the trustee in bankruptcy herein, [113] said claim has not yet been allowed.

#### X.

We except to the finding and report of the Special Master in finding six, page 23, in assessing all, or any part of the costs of this proceeding to the Miller Rubber Company, or to the Miller Rubber Company of California, for the reason that the methods of doing business between the parties involved herein

was, and is now more attributable to the Miller Rubber Company or the Miller Rubber Company of California than to W. D. Newerf, and that correct reports and accounts be forwarded, and properly and promptly, by the said W. D. Newerf accordingly, would have been necessary. Also upon the further ground that the Miller Rubber Company of Ohio, substantially won its case by recovering goods of the estimated value of \$75,000, and that said proceeding was attributable to no other cause than that the receiver and trustee in bankruptcy in the face of their knowledge that there was such a written contract, and contracts, between the Miller Rubber Company of Ohio and the Miller Rubber Company of California, and the said W. D. Newerf refused any adjustment until the matters were heard and determined by the Special Master, and urged an auditing for that purpose.

## XI.

We except to the findings and report of the Special Master in his attempt to close his proceeding before the evidence was all put in, for the reason that at the date of the last hearing, it was specially stated, and should be part of the stenographic report of the proceedings herein, that depositions would have to be taken at Akron, Ohio, to fully and finally determine the questions involved and especially to determine the application of the commissions due to the bankrupt on and after September, 1914, to meet the alleged findings and report of the Mushet Audit Company, and that the same have been properly applied as against the accounts and notes due from the bank-

rupt to the Miller Rubber Company; and to ascertain the interpretation which the parties, [114] to wit: The Miller Rubber Company and the Miller Rubber Company of California, and the bankrupt, placed upon their contract in reference to the basis of figuring or ascertaining the amount of commissions due to the bankrupt, the difference being \$4,495.25; and to determine the question of whether the claim of the bankrupt against the Miller Rubber Company, or the Miller Rubber Company of California, of \$1,613.12 alleged to be due the bankrupt for repairs and advertising was properly allowed under the contract of date June 11th, 1914, or under the contract of November 6th, 1911.

That the questions herein are incomplete and undetermined and inasmuch as the Miller Rubber Company of Ohio have deposited a bond for \$20,000.00 for the matters and things involved herein, the question of delay for the purpose of taking depositions, works no harm or prejudice whatever to any concerned.

WHEREFORE, your petitioners pray that each and all of the foregoing objections and exceptions shall be sustained; that the said cause, and the matters and things at issue and undetermined herein shall be referred to the referee in bankruptcy with instructions to receive any evidence, the depositions taken by the Miller Rubber Company, and to report



132     *The Miller Rubber Company et al. vs.*

its proceedings thereunder to this Court.

THE MILLER RUBBER COMPANY of  
CALIFORNIA.

THE MILLER RUBBER COMPANY.

By BICKSLER & SMITH,

Their Attorneys.

Filed July 29th, 1915, at 35 mins. past 10 A. M.  
Wm. M. Van Dyke, Clerk. Murray C. White,  
Deputy.

**[Order Confirming Special Master's Report, Except  
as to Allowance of Commissions to Miller  
Rubber Company, etc.]**

[115] Minute-book.

Page 7.

Law and General.—Bean.

Monday, 22d of November, 1915.

(July term, A. D. 1915.)

Court met pursuant to adjournment.

Present: The Honorable ROBERT S. BEAN, Dis-  
trict Judge.

No. 1972—BKCY, S. D.

In the Matter of W. D. NEWERF, Bankrupt.

This matter having heretofore been submitted to  
the Court for its consideration and decision on the  
Miller Rubber Company matter; the Court having  
duly considered same, and being fully advised in the  
premises now orally announces its conclusions herein  
and it is ordered that the Special Master's report  
filed herein be and the same hereby is in all things  
confirmed except as to allowance of commissions to  
Miller Rubber Company as to which it is disallowed,

and it is further ordered that the cost of proceedings in the matter of this reference to Special Master be taxed against said Miller Rubber Company and that the cost of distribution of goods amounting to \$1,042.74 be equally divided between parties hereto, the allowance of the Special Master's fee to be hereafter determined by the Court.

**[Order Allowing Special Master's Fee of \$200, etc.]**

[116] Minute-book.

Page 60.

Law and General.—Bean.

No. 1972—BKCY, S. D.

In Re W. D. NEWERF,

Bankrupt.

Pursuant to stipulation of the parties in interest herein it is ordered that Lynn Helm, Esq., Special Master in this matter be and hereby is allowed a fee of \$200; and it is further ordered on motion of W. C. Smith, Esq., of counsel for petitioners, that the order heretofore on November 22d, 1915, made and entered herein be and the same hereby is vacated and set aside so far as it provides for the taxing and distribution of costs and distributions and it is further ordered on like motion that the cost of making up accounts and distribution of goods of Miller Rubber Company amounting to \$1,042.72 and the fees of shorthand reporter on the hearing amounting to \$164.40 and the Special Master's fee of \$200, aggregating \$1,407.34 shall be equally divided and paid by the parties in interest herein.

Court at the hour of 5:01 o'clock P. M. adjourned until Friday the 3d day of December, A. D. 1915, at 10 o'clock A. M.

(F.F.G.)

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[117] (Caption.)

THE MILLER RUBBER COMPANY and THE  
MILLER RUBBER COMPANY OF CALI-  
FORNIA, Corporations,

Appellant

v.

CITIZENS TRUST AND SAVINGS BANK, a Cor-  
poration, as Trustee of the Estate of W. D.  
NEWERF Doing Business as the W. D.  
NEWERF RUBBER COMPANY, Bankrupt,  
Appellee.

**Petition on Appeal [of Miller Rubber Co. et al.].**

To the Honorable Judges of the District Court of the  
United States, Southern District of California,  
Southern Division:

NOW COMES The Miller Rubber Company, a corporation, and The Miller Rubber Company of California, a corporation, petitioners for the reclamation of certain goods, wares and merchandise in the hands of the trustee of the estate of said W. D. Newerf, Bankrupt, as by the record and files of this court in this proceeding more fully appear, and, considering itself aggrieved by the order and final decree of this court made and entered November 22, 1915, confirming the order of the Special Master herein, denying said petition made and entered on or

about the 13th day of July, 1915, does hereby appeal from said order and final decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reason and upon the ground set forth in its assignments of error filed herewith.

Your petitioners present herewith their said assignments of error, and their bond on appeal in the penal sum of two hundred fifty (\$250) dollars, with the American Surety Company of New York, a corporation, authorized to act as surety upon bonds generally within this district, and prays that this, its said appeal, may be allowed and that a transcript of the record proceedings and papers upon which said order and final decree [118] were made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that a citation issue to the Citizens Trust & Savings Bank, a corporation, the trustee in bankruptcy of the estate of the said W. D. Newerf, to be and appear in said Circuit Court of Appeals on a day certain, as provided by law.

BICKSLER, SMITH & PARKE,  
Attorneys for The Miller Rubber Company and the  
Miller Rubber Company of California, Petition  
as Aforesaid.

Filed Dec. 7, 1915, at 30 min. past 4 o'clock P. M.  
Wm. M. Van Dyke, Clerk. Murray C. White, Deputy.

**Bond [on Appeal of Miller Rubber Co. et al.].**

[119] KNOW ALL MEN BY THESE PRESENTS that the undersigned, American Surety Com-



pany of New York, a corporation, duly organized and existing under the laws of the State of New York, duly authorized to transact business within the State of California, as surety, is held and firmly bound unto the Citizens Trust and Savings Bank, a corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, Bankrupt, in the penal sum of two hundred fifty (\$250) dollars, well and truly to be paid to the said Citizens Trust and Savings Bank, Trustee herein, or to its successors in said trust, for the payment of which we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed and dated at Los Angeles this 6 day of December, 1915.

The condition of this obligation is such that

WHEREAS, The Miller Rubber Company and The Miller Rubber Company, of California, corporations, petitioners herein, have appealed to the United States Circuit Court of Appeals of the Ninth Circuit from the order and final decree of the said District Court of the United States for the Southern District of California, Southern Division, denying the petition of The Miller Rubber Company and The Miller Rubber Company of California for the reclamation of certain goods, and other matters and things therein more specifically set forth, which said final order and decree was made and entered of record November 22, 1915, in the records and files of said court;

NOW, THEREFORE, if the said The Miller Rubber Company and The Miller Rubber Company of

California, corporations, shall prosecute their said appeal to effect and answer all costs and damages that may be awarded against them on said appeal, if they fail to make their said appeal good, then this obligation shall be void, otherwise to be and remain in full force and effect.

[120] IN WITNESS WHEREOF, the seal and signature of the said surety company hereto affixed and attested by its duly authorized officers in the city of Los Angeles, State of California, District aforesaid, this 6th day of December, 1915.

AMERICAN SURETY COMPANY OF  
NEW YORK.

[Corporation Seal]

By F. L. HEMMING,  
Resident Vice-President,

Attest: W. J. BENNETT,  
Resident Assistant Secretary.

State of California,  
County of Los Angeles,—ss.

On this 6 day of December, in the year one thousand nine hundred fifteen, before me Grace E. Newcombe, a notary public in and for said Los Angeles County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared F. L. Hemming and W. J. Bennett, known to me to be the Resident Vice-president and resident assistant secretary respectively of the American Surety Company of New York, the corporation described in and which executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation,

and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said county of Los Angeles, the day and year in this certificate first above written.

[Seal]

GRACE E. NEWCOMB,

Notary Public in and for the County of Los Angeles,  
State of California.

My commission expires September 16, 1918.

Approved Dec. 7, 1915.

R. S. BEAN,

Judge.

Filed Dec. 7, 1915, at 30 min. past 4 o'clock P. M.  
Wm. M. Van Dyke, Clerk. Murray C. White,  
Deputy.

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[121] (Caption.)

THE MILLER RUBBER COMPANY, a Corpora-  
tion, THE MILLER RUBBER COMPANY  
OF CALIFORNIA, a Corporation,  
Appellants,

vs.

CITIZENS TRUST AND SAVINGS BANK, a Cor-  
poration, as Trustee of the Estate of W. D.  
NEWERF Doing Business as W. D.  
NEWERF RUBBER COMPANY, Bankrupt,  
Appellee.

**Order Granting Appeal and Fixing the Amount of  
Bond on Appeal [of Miller Rubber Co. et al.].**

The petitioners, The Miller Rubber Company and

The Miller Rubber Company of California, having heretofore filed their petition for appeal and therewith assignments of error, together with their bond in the penal sum of two hundred fifty (\$250) dollars, conditioned as required by law, with the American Surety Company of New York as surety; and having further given due notice to the trustee of the above-named bankrupt of its said petition and said bond and the time of presenting same;

IT IS ORDERED that the said appeal be and the same is hereby allowed to the said petitioners and the amount of said bond on appeal is hereby fixed in the sum of two hundred fifty (\$250) dollars, and the said bond in said penal sum, with the surety aforesaid, is hereby approved; and

IT IS FURTHER ORDERED that citation issue to the said Citizens Trust and Savings Bank, as trustee of the said bankrupt estate, as provided by law.

Done in open court at the city of Los Angeles, District aforesaid, this 7th day of December, 1915.

(Signed) R. S. BEAN,  
Judge of the District Court for the Southern District of California, Southern Division.

Filed Dec. 7, 1915, at 30 min. past 4 o'clock P. M.  
Wm. M. Van Dyke, Clerk. Murray C. White, Deputy.



[122] (Caption.)

**Citation of Appeal [of Miller Rubber Co. et al.  
(Copy)].**

To the Citizens Trust and Savings Bank, a Corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, bankrupt:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals of the Ninth Circuit to be holden in the city of San Francisco, in the State of California, on the 3d day of January, 1916, pursuant to the petition on appeal and assignments of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, holding terms in the city of Los Angeles, in said District, in the above-entitled proceeding, in which The Miller Rubber Company, a corporation, and The Miller Rubber Company of California, a corporation, and The Miller Rubber Company of California, a corporation, are petitioners and claimants, to show cause, if any there be, why the final decree and judgment rendered in such cause, confirming the order and decree of the Special Master disallowing and refusing the claim and petition of said petitioners, for the reclamation of certain goods, wares and merchandise, and the other matters and things, as in said petition on appeal and assignments of error mentioned and set forth, should not be reversed, set aside and corrected; and why speedy justice should not be done to said petitioners in that behalf.

WITNESS the Honorable R. S. BEAN, United States District Judge for the Southern District of California, Southern Division, this 7th day of December, 1915.

(Signed) R. S. BEAN,  
United States District Judge, Southern District of  
California, Southern Division.

Filed Dec. 7, 1915, at 30 min. past 4 o'clock P. M.  
Wm. M. Van Dyke, Clerk. Murray C. White,  
Deputy.

[123] (Caption.)

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**Assignments of Error [on Appeal of Miller Rubber  
Co. et al.].**

NOW COMES The Miller Rubber Company, a corporation, and The Miller Rubber Company of California, petitioners for the reclamation of certain goods, wares and merchandise in the hands of the Citizens Trust and Savings Bank, Trustee of the above-entitled bankrupt estate, and petitioners on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and final decree of the above-entitled District Court, made and entered November 22, 1915, denying its said petition for reclamation, and herewith makes upon, and pursuant to, its said petition, the following assignments of error, to wit:

I.

The said District Court erred in its finding, decision and judgment, under the evidence, and the law, that the title of said goods sought to be re-

claimed was in the trustee of said bankrupt estate and not in The Miller Rubber Company, the petitioner for reclamation.

## II.

The said District Court erred in its finding, decision and judgment, under the evidence, and the law, that the contract and transaction therein set forth between said bankrupt and said petitioner, for reclamation, constituted a sale of the said goods by the petitioner to the said bankrupt.

## III.

That said District Court erred in its finding, decision and judgment, under the evidence, that The Miller Rubber Company, the petitioner herein, obtained and had a preference from said bankrupt in the alleged sum of two hundred sixty-nine and ninety-eight hundredths (\$269.98) dollars, or in any other sum.

## IV.

That said District Court erred in its finding, decision and judgment that the Miller Rubber Company of California is a [124] distinct entity from The Miller Rubber Company of Ohio and that in all the matters and things involved herein, it must be so adjudged, upon the ground that The Miller Rubber Company of California was and is at all times the agent of The Miller Rubber Company and that said bankrupt knew and understood at all times that all of his said transactions and contracts were, in reality, with the parent corporation, The Miller Rubber Company.

## V.

The said District Court erred in not finding, under the evidence and the law, that the contracts and transactions therein set forth between the petitioner and the said bankrupt constituted and appointed the said bankrupt the agent of The Miller Rubber Company (or ostensibly the agent of The Miller Rubber Company of California) for the sale of all goods on hand or in transit on July 1, 1914; and that the title to all of said goods in the hands of said bankrupt or in transit on July 1, 1914, and now in the hands of the trustee in bankruptcy herein, and remaining unsold, was and is in the petitioner, The Miller Rubber Company, for reclamation.

## VI.

The said District Court erred in failing to find, under the evidence and the law, that the title to all of said goods in the hands of said bankrupt or in transit on July 1, 1914, was and is in the petitioner for reclamation, and that the said petitioner for reclamation had and has a present right to all of said goods, wares and merchandise.

## VII.

The said District Court erred in its finding, decision and judgment, that the said contract of November 6, 1911, between the petitioner and the bankrupt, is still in force and effect.

## [125] VIII.

The said District Court erred in not finding, under the evidence and the law, that the contract of June 11, 1914, and the supplement thereto, between the



petitioner, The Miller Rubber Company of California and the said bankrupt, superceded and annulled the said contract of November 6, 1911, as aforesaid.

### IX.

The said District Court erred in not finding, under the evidence and the law, that the trustee in bankruptcy herein, by taking possession of the property in the hands of said bankrupt or in transit on June 11, 1914, and attempting to sell and dispose of all of said property, and in making no attempt to carry on the business, would necessarily abrogate and did terminate the said contract of November 6, 1911, if it had had any force and effect after June 11, 1914.

### X.

The said District Court erred, under the evidence, in its finding, decision and judgment, that no consent was given to the said bankrupt to make application of commissions that might be due to him (ostensibly from The Miller Rubber Company of California) from The Miller Rubber Company, as against the amount owing by him on open account or notes to The Miller Rubber Company of California or The Miller Rubber Company.

### XI.

The said District Court erred in not allowing the depositions of the petitioners in relation to all matters in controversy between The Miller Rubber Company and the bankrupt to be read in evidence, said depositions being as follows:

C. Douglas Lane, age thirty (30) years, Chief Bookkeeper and Auditor of The Miller Rubber Company, one of the petitioners herein, for five and one-

half (51½) years, testifies that, during the whole of said period, he has been bookkeeping and auditing said company's books; that there is but one set of books for both [126] of said companies, to wit, The Miller Rubber Company and The Miller Rubber Company of California; that those books are the books of the Miller Rubber Company; that The Miller Rubber Company of California kept no other or separate set of books; that the accounts of The Miller Rubber Company of California were kept on the books of The Miller Rubber Company exactly as all other accounts of The Miller Rubber Company, and all cash received from California accounts was deposited in the name of The Miller Rubber Company and credited on its books to the credit of the individual customers of The Miller Rubber Company, to whom the same had been charged, and payment was made by The Miller Rubber Company of all accounts payable to California customers, in the same manner as payments were made to other customers of The Miller Rubber Company; that no other books were kept since the organization of The Miller Rubber Company of California; that all computations of commissions to agents under contracts with such agents are made in witness's department under his supervision; that he is personally acquainted with the method of figuring commissions on said contracts, including the contract between The Miller Rubber Company of California and the said W. D. Newerf; that said W. D. Newerf's commissions were, at all times, computed as follows; All commissions were based upon the prices at which

goods were actually sold by Newerf. If Newerf's price to the customer was net, we computed commissions on the actual price given, but if, as in most instances, Newerf's customer was allowed a discount of 5% for cash, we computed commission by first deducting the 5%, on the assumption that the customer would take advantage of the cash discount, and computed the commission upon the remaining 95% of the bill. If, however, the customer did not take advantage of the 5% discount for cash, but paid the full amount of the bill, we, at the end of the month, gave Newerf credit for the full amount of the 5% discount which the customer was entitled to if they had taken advantage of it. We computed [127] these commissions in the same manner on both the San Francisco and Los Angeles accounts, and we have computed all commissions to all agents under similar contracts in precisely the same manner; that from witnesses own knowledge, verified by the books of The Miller Rubber Company, the said W. D. Newerf is entitled to credit, and has been given credit, on the books of The Miller Rubber Company, from July 1, 1914, to March 20, 1915, of thirteen thousand two hundred forty-five and seventy-two hundredths (\$13,245.72) dollars, as shown by the books of original entry made a part of said deposition; that the total amount of commissions due to said W. D. Newerf on his San Francisco business between July 1, 1914, and January 1, 1915, was \$4,731.59. Said W. D. Newerf's claim for commissions in said city during said time is five thousand two hundred seven and eight hundredths (\$5,207.08)

dollars; that the difference is evidently based upon the argument over the 5% discount for cash.

Witness knows F. B. Thies, who is treasurer of The Miller Rubber Company and The Miller Rubber Company of California, and Mr. William F. Pfeiffer, who is secretary and general manager of The Miller Rubber Company and Secretary of The Miller Rubber Company of California, both directed that the amount of commissions due to the said W. D. Newerf, under his said contract, be credited, and that said commissions were credited, to the said W. D. Newerf's open account, said open account being the amount due The Miller Rubber Company by the said Newerf, accruing between July 1, 1914, and March 20, 1915; that witness is familiar with the bills receivable of the said W. D. Newerf to The Miller Rubber Company; that, on July 1, 1914, The Miller Rubber Company held the said W. D. Newerf's notes as follows:

Note of March 14, 1914, due July 14, 1914. .	\$2,000.00
Note of March 14, 1914, due July 14, 1914. .	2,000.00
Note of March 14, 1914, due July 14, 1914. .	1,500.00
Note of March 14, 1914, due July 14, 1914. .	1,500.00
[128] Note of April 15, 1914, due August	
15, 1914. ....	\$2,000.00
Note of April 15, 1914, due August 15,	
1914 ....	1,562.69
Note of April 15, 1914, due August 15,	
1914 ....	2,959.88
Note of April 15, 1914, due August 15,	
1914 ....	2,500.00
Note of May 15, 1914, due Sept. 15, 1914. . .	2,284.61



Note of May 15, 1914, due Sept. 15, 1914...	2,000.00
Note of May 15, 1914, due Sept. 15, 1914...	2,864.74
Note of May 15, 1914, due Sept. 15, 1914...	3,000.00
Note of June 13, 1914, due October 12, 1914 .....	1,800.00
Note of June 15, 1914, due October 15, 1914 .....	2,810.08
Note of June 15, 1914, due October 15, 1914, .....	2,500.00
Note of June 15, 1914, due October 15, 1914 .....	1,702.45
Note of June 15, 1914, due October 15, 1914, .....	2,000.00
Note of June 19, 1914, due October 15, 1914 .....	2,000.00

That said notes aggregate thirty-eight thousand nine hundred eighty-four and forty-five hundredths (\$38,984.45) the first eight (8) amounting to sixteen thousand twenty-two and fifty-seven hundredths (\$16,022.57) dollars, were paid at maturity; that the four (4) notes dated May 15, 1914, due September 15, 1914, aggregating ten thousand one hundred forty-nine and thirty-five hundredths (\$10,149.35) dollars, and were not paid at maturity, but, at maturity, said W. D. Newerf sent a check for one thousand one hundred ninety-seven and ninety-one hundredths (\$1,197.91) dollars, and a new note for one thousand (\$1,000) dollars due December 14, 1914, and the balance on said four (4) notes was charged back to said W. D. Newerf's open account on date of maturity of said four (4) notes; that all of the afore-described eighteen (18) notes were given by the said

W. D. Newerf to apply on the amount due from him, W. D. Newerf, to The Miller Rubber Company under his contract of November 6, 1911, to cover collections made by said W. D. Newerf and not remitted to The Miller Rubber Company. The note of June 12, 1914, and the notes of June 15, 1914, were not paid at maturity [129] but were renewed and are still outstanding and unpaid. On July 15, 1914, the said W. D. Newerf gave six (6) additional notes aggregating twelve thousand seven hundred forty-nine and nine hundredths (\$12,749.09) dollars due November 15, 1914, which were not paid but were renewed on November 15, 1914, which said renewed notes have not been paid. On September 14, 1914, said W. D. Newerf gave a note for one thousand (\$1,000) dollars due December 14, 1914, which said note was renewed December 14, 1914, and is unpaid. The total amount due on the notes of the said W. D. Newerf to The Miller Rubber Company, not including interest, is now twenty-six thousand five hundred and sixty-one and sixty-two hundredths (\$26,561.62) dollars; that the leaves from the books of original entry of The Miller Rubber Company show the credits given to the said W. D. Newerf, the issuing of the aforesaid notes and the charges made to said W. D. Newerf on failure to pay said notes; that the leaves of said books show as follows: The amount due from the said W. D. Newerf to The Miller Rubber Company under the contract of November 6, 1911, for collections made by said W. D. Newerf and not remitted, on Los Angeles accounts, two thousand four hundred fifty and nine-

teen hundredths (\$2,450.19) dollars; notes unpaid, eight thousand one hundred forty-nine and thirty-five hundredths (\$8,149.35) dollars; on San Francisco accounts seven hundred dollars and ninety-four cents (\$700.94), a total of eleven thousand three hundred dollars forty-eight cents (\$11,300.48); that, as against said charges, said W. D. Newerf is to be credited with the ten thousand eight hundred sixty-nine and eighty-seven hundredths (\$10,869.87) dollars leaving a balance due to The Miller Rubber Company on open account from collections made by him under the contract of November 6, 1911, and not remitted of four hundred thirty and sixty-one hundredths (\$430.61) dollars; that the said W. D. Newerf is chargeable with, Los Angeles business, three thousand seven hundred twenty-two and eighty-two hundredths [130] (\$3,722.82) dollars, San Francisco business, seven hundred thirty-six and forty-four hundredths (\$736.44) dollars, on San Bernardino business four hundred ninety-five and thirteen hundredths (\$495.13) dollars, or a total of four thousand nine hundred fifty-four and *thirty-nine* hundredths (\$4,954.13) dollars, all of which said items were charged to the said W. D. Newerf's open account and all commissions accruing to the said W. D. Newerf after October 1914, were applied in payment of this open account as follows:

November, 1914, commissions . . . . .	\$1,406.39
December, 1914, commissions . . . . .	1,129.06
January, 1915, commissions . . . . .	1,123.37
February, 1915, commissions . . . . .	645.13
March 1 to 20, 1915, commissions . .	1,123.72

making an aggregate credit of five thousand, four hundred twenty-eight and seventeen hundredths (\$5,428.17) dollars; that, after giving said W. D. Newerf credit for all of said items, the whole account shows a balance due from the said W. D. Newerf to The Miller Rubber Company, in addition to the amount due on the aforesaid described notes, the sum of six hundred fifty and seventy hundredths (\$650.70) dollars; that witness's exhibit K, being the leaves from the books of original entry, contains a full summary and statement of said figures, to wit, six hundred fifty and seventy hundredths (\$650.70) dollars; that statements of commissions, accounts due to said W. D. Newerf, July 14, 1914, to March 20, 1915, were sent to said W. D. Newerf every month as completed; that, at no time, during said period, did The Miller Rubber Company send a check for any part of said commissions but informed the said W. D. Newerf that these commissions were credited on his open account and that, at no time during said period, did the said W. D. Newerf object to the application of said commissions to his open account; that all of said notes were given to the said The Miller Rubber Company by said W. D. Newerf to cover money collected by him under [131] the contract of November 6, 1911, with The Miller Rubber Company for collections made by him under said contract and not remitted to The Miller Rubber Company; that none of said notes were given on account of the contract of 1914, between said W. D. Newerf and The Miller Rubber Company of California; that The Miller Rubber



Company has received statements from said W. D. Newerf, wherein he claims, as commissions for July 1, 1914, to March 20, 1915, aggregating fifteen thousand, four hundred six and forty hundredths (\$15,406.40) dollars; that, according to said W. D. Newerf, the credit of one thousand, one hundred seventy-five and forty-six hundredths (\$1,175.46) dollars is to be given to The Miller Rubber Company, under date of December 31, 1914, to set off charges made against The Miller Rubber Company on business where customers had taken advantage of the five per cent (5%) discount. This leaves, Mr. Newerf claims, for commissions, fourteen thousand, two hundred thirty and ninety-four (\$14,230.94) dollars for said period. This difference between the amount claimed by Mr. Newerf as commissions for said period of fourteen thousand, two hundred thirty and ninety-four hundredths (\$14,230.94) dollars, and the amount of commissions allowed to The Miller Rubber Company, to wit, thirteen thousand, two hundred forty-five and seventy-two hundredths (\$13,245.72) dollars is probably to be accounted for by the failure of Mr. Newerf to give The Miller Rubber Company credit for overcharges in commissions where customers took advantage of the five per cent (5%) discount; that the aggregate amount due The Miller Rubber Company from the said W. D. Newerf, according to the books of The Miller Rubber Company, to the witness's own personal knowledge, is twenty-seven thousand, two hundred twelve and twenty-nine hundredths (\$27,212.29) dollars, of which amount twenty-six thousand, five hundred

sixty-one and sixty-two hundredths (\$26,561.62) dollars is on said notes and said six hundred fifty and sixty-one hundredths (\$650.61) dollars, as aforesaid, is the balance due on open [132] account from said W. D. Newerf to the Miller Rubber Company; that the data and figures to make up the aforesaid books of the Miller Rubber Company, to all of which witness testifies, were made from no other source than reports by the said W. D. Newerf to The Miller Rubber Company, pursuant to contract.

Mr. F. B. Thiess testifies: I am treasurer of The Miller Rubber Company and The Miller Rubber Company of California and I am personally familiar with transactions between both companies and the said W. D. Newerf. I am familiar with the contract of November 6, 1911. Said W. D. Newerf and The Miller Rubber Company operated under said contract of June, 1914, when The Miller Rubber Company was incorporated, and said new contract was made between The Miller Rubber Company of California and the said W. D. Newerf. All commissions, complaints, repairs, and replacements, under the contract of November 6, 1911, were taken care of by The Miller Rubber Company after the contract of 1914, as stated above, was entered into. The commissions due to said W. D. Newerf, under the 1914 contract, as stated by me above, were credited on the books of The Miller Rubber Company to his old (1911) open account and The Miller Rubber Company and The Miller Rubber Company of California never received any objections from Mr. Newerf to its being done that way; the executive

committee of The Miller Rubber Company, to wit, Jacob Pfeiffer, William F. Pleiffer and witness, know said W. D. Newerf's commissions under contract of November 6, 1911, were credited on old (contract of November 6, 1911) open account and said executive committee directed that this be done; The Miller Rubber Company of California was organized and is acting as the agent of The Miller Rubber Company in the State of California; it keeps no books nor records other than of its organization and minutes and all business is entered on the books of The Miller Rubber Company only; all bills and accounts receivable are credited to The Miller Rubber Company of California; The Miller Rubber Company of California [133] was organized May, 1913; prior to that date, The Miller Rubber Company operated in California under the contract of November 6, 1911, with said W. D. Newerf, by which The Miller Rubber Company shipped goods to said W. D. Newerf on consignment, reserving title to itself until sold by said W. D. Newerf; W. D. Newerf made collections on sales and agreed to remit the proceeds to The Miller Rubber Company at Akron, Ohio, and he took no title to any of said goods and *be* never claimed title to any of said goods so shipped to him or any interest in them, except the right to sell them; under the contract of 1914, all goods shipped under the name of The Miller Rubber Company were shipped to The Miller Rubber Company of California as the agency of The Miller Rubber Company.

## XII.

The said District Court erred, under the evidence

and the law, in its finding, decision and judgment denying the petition for reclamation, and in affirming the order theretofore made by the Special Master denying said petition.

WHEREFORE, the said petitioner for reclamation prays that said order of final decree and judgment of said District Court be reversed and that the said District Court may, by mandate, be directed to enter a final order and decree allowing the petition for reclamation and allowing all of the other matters and things in which it is herein set forth and alleged that the said District Court erred.

BICKSLER, SMITH & PARKE,

Attorneys for The Miller Rubber Company and The  
Miller Rubber Company of California.

Filed Dec. 7, 1915, at 30 min. past. 4 o'clock P. M.  
Wm. M. Van Dyke, Clerk. Murray C. White, Deputy.

[134] (Caption.)

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**Notice of Motion [to Receive Depositions in Evidence, etc.].**

To Citizens Trust & Savings Bank, Trustee in Bankruptcy; To Norman A. Bailie and Dave F. Smith, Attorneys for the Trustee:

You and each of you will take notice that on Monday, August 2d, 1915, at 10 o'clock A. M., or as soon thereafter as the Court will hear the same, The Miller Rubber Company and The Miller Rubber Company of California, will, while denying that the issues between said companies and the trustee herein



have been duly, regularly or rightfully closed, move the Court to receive in evidence the depositions to be filed herein, or to refer said case, and the issues therein to the Special Master again for determination of the questions still at issue between the parties and to receive in evidence for that purpose the depositions to be filed as per notice heretofore served and filed herein.

Said notice will be based upon the records, files and proceedings of the issues between The Miller Rubber Company, The Miller Rubber Company of California, and the said trustee in bankruptcy herein, and the affidavits of W. C. Smith, one of the attorneys of record for the claimants herein, and C. R. Wetsel, copies of which have been duly served and filed herein.

Dated July 28, 1915.

BICKSLER, SMITH & PARKE,  
Attorneys for The Miller Rubber Company, and The  
Miller Rubber Company of California.

Filed July 29, 1915, at 35 min. past 10 o'clock  
A. M. Wm Van Dyke, Clerk. Murray C. White,  
Deputy.

[135] *In the District Court of the United States,  
Southern District of California, Southern Di-  
vision.*

In re W. D. NEWERF, Bankrupt—No. 1972.  
THE MILLER RUBBER COMPANY, and THE  
MILLER RUBBER COMPANY OF CALI-  
FORNIA, Corporations,

Appellants,

vs.

CITIZENS TRUST AND SAVINGS BANK, a  
Corporation, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as the W. D.  
NEWERF RUBBER COMPANY, Bank-  
rupt.

Appellee.

**Order Extending Time to [February 1, 1916 to]  
file Transcript [Copy].**

Good cause appearing therefor, it is hereby or-  
dered, that the time allowed appellants to docket said  
cause and file the record thereof with the clerk of  
the United States Circuit Court of Appeals for the  
Ninth Circuit, be, and the same is hereby, enlarged  
and extended to and including the first day of Feb-  
ruary, 1916.

Dated at Los Angeles, California, December 20,  
1915.

R. S. BEAN,  
United States District Judge, Southern District of  
California.

[136]    *In the District Court of the United States,  
Southern District of California, Southern Di-  
vision.*

In re W. D. NEWERF, Bankrupt—No. 1972.  
THE MILLER RUBBER COMPANY, and THE  
MILLER RUBBER COMPANY OF CALI-  
FORNIA, Corporations,

Appellants,

vs.

CITIZENS TRUST AND SAVINGS BANK, a  
Corporation, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as the W. D.  
NEWERF RUBBER COMPANY, Bank-  
rupt.

Appellee.

**Order Allowing Transcript on Appeal [of Miller  
Rubber Co. et al.].**

The foregoing transcript on appeal, including the testimony herein, having been submitted to the Court for approval, now upon stipulation of parties duly signed and filed herein, it is ordered that the foregoing testimony, documents and papers be, and the same hereby are, made the record for the purpose of said appeals, all of which is done within the time required by law.

Dated at Los Angeles, California, this 10th day of January, 1916.

R. S. BEAN,  
Judge.

**[Stipulation that Transcript is True and Correct,  
etc.]**

Stipulated the foregoing transcript is true and correct and may be approved at once.

BICKSLER, SMITH & PARKE,  
Attorneys for Appellants.  
W. T. CRAIG,  
DAVE F. SMITH,  
NORMAND A. BAILIE,  
Attorneys for Appellee.

Dated Jany. 6, 1916.

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**[Certificate of Clerk, U. S. District Court to Transcript of Record on Appeal of Miller Rubber Co., et al.]**

*In the District Court of the United States in and for  
the Southern District of California, Southern  
Division.*

No. 1972—BKCY.,

In the Matter of W. D. NEWERF,

Bankrupt.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify that the foregoing one hundred and thirty-six (136) typewritten pages, numbered from 1 to 136, inclusive, and comprised in one (1) volume, are true and correct copies of the record and proceedings upon the petition of The Miller Rubber Company, and



The Miller Rubber Company of California, against the Citizens Trust and Savings Bank, a Corporation, as trustee in bankruptcy of the estate of W. D. Newerf, Bankrupt, in the matter of W. D. Newerf, Bankrupt, No. 1972—Bankruptcy, Southern Division, as contained in the transcript on appeal prepared by the appellant, pursuant to the stipulation of the parties, and approved by the Honorable R. S. Bean, District Judge and filed herein.

I do further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$81 20/100, the amount whereof has been paid me by the attorneys of record for the appellant in the above-entitled matter.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 13th day of January, in the year of our Lord, one thousand, nine hundred and sixteen, and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,  
Clerk, U. S. District Court for the Southern District of California,

By Leslie S. Colyer,  
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
1/13/16. L. S. C.]

[Endorsed]: No. 2737. United States Circuit Court of Appeals for the Ninth Circuit. The Miller Rubber Company, a Corporation, and The Miller Rubber Company of California, a Corporation, Appellants, vs. Citizens Trust and Savings Bank, a Corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, Doing Business as W. D. Newerf Rubber Company, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed January 17, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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*In the District Court of the United States, Southern  
District of California, Southern Division.*

In re W. D. NEWERF, Bankrupt—No. 1972.

THE MILLER RUBBER COMPANY, and THE  
MILLER RUBBER COMPANY OF CALI-  
FORNIA, Corporations,

Appellants,

vs.

CITIZENS TRUST AND SAVINGS BANK, a Cor-  
poration, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as the W. D.  
NEWERF RUBBER COMPANY, Bankrupt,  
Appellee.

**Order Extending Time to [February 1, 1916, to] File Transcript [Original].**

Good cause appearing therefore, it is hereby ordered, that the time allowed appellants to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the first day of Feb., 1916.

Dated at Los Angeles, California, December 20, 1915.

R. S. BEAN,  
United States District Judge, Southern District of  
California.

[Endorsed]: No. 1972. In the United States District Court, Southern District of California, Southern Division. In the Matter of W. D. Newerf, Bankrupt. Order Extending Time to File Transcript. Filed Dec. 20, 1915. Wm. M. Van Dyke, Clerk. F. F. Green, Deputy.

No. 2737. United States Circuit Court of Appeals, for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Feb. 1, 1916, to File Record thereof and to Docket Case. Filed Jan. 17, 1916. F. D. Monckton, Clerk.

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee in Bankruptcy of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,

Appellant,

vs.

MILLER RUBBER COMPANY, a Corporation, and  
MILLER RUBBER COMPANY OF CALIFORNIA, a Corporation,

Appellees.

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**Transcript of Record.**

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Upon Appeal from the United States District Court for the  
Southern District of California, Southern Division.

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**Names and Addresses of Attorneys [on Appeal of  
Citizens Trust & Savings Bank].**

For Appellant, Citizens Trust and Savings Bank, a  
Corporation, Trustee, of W. D. Newerf,  
Bankrupt:

NORMAN A. BAILIE, Esq., Suite 831 Higgins  
Building, Los Angeles, California.

For Appellees, Miller Rubber Company and Miller  
Rubber Company, of California, Corpora-  
tions:

Messrs. BICKSLER, SMITH & PARKE, 827-  
829 Citizens National Bank Building, Los  
Angeles, California. [3\*]

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*In the District Court of the United States, Southern  
District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK, a Corpora-  
tion, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as W. D. NEW-  
ERF RUBBER COMPANY, Bankrupt,  
Appellant,

vs.

MILLER RUBBER COMPANY and MILLER  
RUBBER COMPANY OF CALIFORNIA,  
Corporations,

Appellees.

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\*Page-number appearing at foot of page of original certified Record.

**Citation on Appeal of Citizens Trust & Savings  
Bank (Original).**

TO THE MILLER RUBBER COMPANY AND  
MILLER RUBBER COMPANY OF CALI-  
FORNIA, Corporations:

YOU ARE HEREBY CITED and admonished to be and appear at a session of the United States Circuit Court of Appeals in the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, on the 1st day of February, 1916, pursuant to the petition on appeal and assignments of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, holding terms in the city of Los Angeles, in said District in the above-entitled proceeding, in which Citizens Trust & Savings Bank, a corporation, as trustee of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, is petitioner and claimant, to show cause if any there be, why the final decree and judgment rendered in such case reversing the order and decree of the Special Master by which order and decree the Miller Rubber Company of California, or its bondsman is ordered to pay to the trustee herein, Citizens Trust & Savings Bank, a corporation, the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4495.25), being [4] the amount of commissions still due the Bankrupt from said Miller Rubber Company of California, and the other matters and things as in said petition on appeal and assignments of error mentioned and set

forth should not be reversed, set aside and corrected; and why speedy justice should not be done to said Citizens Trust & Savings Bank, a corporation, Trustee, in that behalf.

WITNESS the Honorable ERSKINE M. ROSS, Judge of the United States District Court for the Southern District of California, Southern Division, this 3d day of January, 1916.

ERSKINE M. ROSS,  
Circuit Judge.

[5]

[Endorsed]: Original. No. 1972—Bkey. United States District Court, Southern District of California, Southern Division. Citizens Trust & Savings Bank vs. Miller Rubber Company. Citation on Appeal. Filed Jan. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Service of the within Citation is hereby admitted this 3d day of January 1916.

BICKSLER, SMITH & PARKE,  
Attorney for Appellee.

[6]

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*In the District Court of the United States, in and for the Southern District of California, Southern Division.*

No. 1972—BKCY.

In the Matter of W. D. NEWERF,

Bankrupt.

[7]



ORIGINAL.

*In the District Court of the United States, Southern  
District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK a Cor-  
poration, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as W. D. NEW-  
ERF RUBBER COMPANY, Bankrupt,  
Appellant,

vs.

MILLER RUBBER COMPANY, and MILLER  
RUBBER RUBBER OF CALIFORNIA,  
Corporations,

Appellees.

**Petition on Appeal [of Citizens Trust & Savings  
Bank].**

To the Honorable Judges of the District Court of  
the United States, Southern District of Califor-  
nia, Southern Division:

Comes now Citizens Trust & Savings Bank, a  
corporation, trustee in bankruptcy of the estate of  
W. D. Newerf, doing business as W. D. Newerf  
Rubber Company, Bankrupt, respondent for the  
reclamation of certain goods, wares, and merchan-  
dise, in the hands of said trustee, as by the records  
and files of this court in this proceeding more fully  
appear, and considering itself aggrieved by the  
order and final decree of this Court made and en-  
tered November 22d, 1915, reversing the order of  
the Special Master herein, and refusing to render  
judgment in favor of said trustee, and against

Miller Rubber Company of California, for the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4,495.25), said order of the Special Master having been made and entered on or about the 13th day of July, 1915, does hereby appeal from said order and final decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reason and [8] upon the grounds set forth in its assignments of error filed herewith.

Your petitioner prays that its said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and final decree were made, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that a citation issue to the Miller Rubber Company of California, to be and appear in said Circuit Court of Appeals on a date certain, as provided by law.

Dated December 30, 1915.

W. T. CRAIG,  
DAVE F. SMITH,  
NORMAN A. BAILIE,

Attorneys for Citizens Trust & Savings Bank,  
Trustee in Bankruptcy of the Estate of W. D.  
Newerf, Doing Business as W. D. Newerf Rubber Company, Bankrupt.

[Endorsed]: Original. No. 1972—Bankruptcy. United States District Court Southern District of California Southern Division. Citizens Trust & Savings Bank vs. Miller Rubber Company, Petition on Appeal. Service of the within petition is hereby admitted this 31 day of Dec., 1915. Bicksler,

Smith & Parke Attorneys for Appellee. Norman A. Bailie, Suite 831 Higgins Bldg., Second & Main Sts., Los Angeles, Cal., Phones: Home 10112, Main 4622. Attorney for Trustee. Filed Dec. 31, 1915, at 10 min. past 2 o'clock P. M. Wm. M. Van Dyke, Clerk, Murray C. White, Deputy. [9]

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ORIGINAL.

*In the District Court of the United States, Southern District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellant,

vs.

MILLER RUBBER COMPANY, and MILLER RUBBER COMPANY OF CALIFORNIA, Corporations,

Appellees.

**Assignments of Error [ on Appeal of Citizens Trust & Savings Bank].**

Comes now Citizens Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, respondent for the reclamation of certain goods, wares and merchandise in the hands of the said trustee, and petitioner on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and final decree of the above-entitled District Court,

made and entered November 22d, 1915, and reversing the decree and order of the Special Master declaring that said trustee is entitled to recover from the Miller Rubber Company of California, or its bondsman, the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4,495.25), the amount of commissions found by said Special Master to be still due bankrupt from said Miller Rubber Company of California, and herewith makes the following assignments of error: [10]

1. The said District Court erred in its finding, decision and judgment under the evidence and the law that there was not due and owing to said trustee from the Miller Rubber Company of California the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4,495.25), or any other sum, as commissions still due bankrupt from the Miller Rubber Company of California, against which there was no offset whatsoever.

2. The said District Court erred, failing to find as a matter of law under the evidence that the actual selling price of goods sold by W. D. Newerf, Agent of the Miller Rubber Company of California, there was not due and owing to said trustee from under the contract of June 11th, 1914, was the amount at which said merchandise was billed, whether or not the customer purchasing said goods took advantage of the five per cent (5%) discount offered for cash.

3. The said District Court erred in its finding, decision and judgment that the actual selling price of the goods sold by W. D. Newerf, Agent of the Miller Rubber Company of California, under the



contract of June 11th, 1914, where goods were sold for cash, was the invoice price of said goods less the five per cent (5%) allowed for cash.

WHEREFORE, said respondent for reclamation prays that the order of final decree and judgment of said District Court reversing the finding of the Special Master herein that the said trustee in bankruptcy is entitled to recover from the Miller Rubber Company of California, or its bondsman, the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4,495.25), the amount of commissions still due Bankrupt from the Miller Rubber Company of California, against which there is no offset whatsoever, be reversed, and that the said District Court may *be* [11] mandate, be directed to enter *and* final order and decree to the affect that the Citizens Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, do have and recover of and from the Miller Rubber Company of California, a corporation, or its bondsman, American Surety Company, a corporation the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4,495.25), and allowing all of the other matters and things in which it is herein set forth and alleged that the said District Court erred:

DAVE F. SMITH,

NORMAN A. BAILIE,

W. T. CRAIG,

Attorneys for Citizens Trust & Savings Bank,  
Trustee in Bankruptcy of the Estate of W. D.  
Newerf, Doing Business as W. D. Newerf  
Rubber Company, Bankrupt.

[Endorsed]: Original. No. 1972—Bankruptcy United States District Court, Southern District of California, Southern Division. Citizens Trust & Savings Bank vs. Miller Rubber Company, et al. Assignments of Error. Service of the within petition is hereby admitted this 31 day of Dec., 1915. Bicksler, Smith & Parke, Attorneys for Appellee. Norman A. Bailie, Suite 831 Higgins Bldg, Second & Main Sts., Los Angeles, Cal., Phones: Home 10112, Main 4622, Attorney for Trustee. Filed Dec, 31, 1915, at 10 min, past 2 o'clock P. M. Wm. M. Van Dyke, Clerk. Murrey C. White, Deputy. [12]

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ORIGINAL.

*In the District Court of the United States, Southern District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellant,

vs.

MILLER RUBBER COMPANY, and MILLER RUBBER COMPANY OF CALIFORNIA, Corporations,

Appellees.

**Order Granting Appeal [of Citizens Trust & Savings Bank].**

The petitioner, Citizens Trust & Savings Bank, a corporation, Trustee in Bankruptcy of the Estate of

W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, having heretofore filed its petition for appeal and therewith assignments of error, together with its bond in the penal sum of Two Hundred Fifty Dollars (\$250) conditioned as required by law, with the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, and having further given due notice to the Miller Rubber Company of California, of its said petition and said bond, and the time of presenting same, ,

IT IS ORDERED that the said appeal be, and the same is hereby allowed to the said respondent.

IT IS FURTHER ORDERED that citation issue to the Miller Rubber Company of California, a corporation, as provided by law. [13]

Done in open court at the city of Los Angeles, district aforesaid, this 31st day of December, 1915.

ROSS,  
Circuit Judge.

[Endorsed]: Original. No. 1972—Bankruptcy. United States District Court, Southern District of California, Southern Division. Citizens Trust & Savings Bank vs. Miller Rubber Company. Order Granting Appeal. Service of the within order is hereby admitted this 31 day of Dec., 1915. Bicksler, Smith & Parke, Attorneys for Appellee. Norman A. Bailie, Suite 831 Higgins Bldg., Second & Main Sts., Los Angeles, Cal., Phones: Home 10112, Main 4622, Attorney for Trustee. Filed Dec. 31, 1915, at 30 min. past 2 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [14]

[**Stipulation that Transcript on Appeal of Miller Rubber Co. et al. may be Used as Transcript on Appeal of Citizens Trust & Savings Bank.**]

ORIGINAL.

*In the District Court of the United States, Southern District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, BANKRUPT,  
Appellant,

vs.

MILLER RUBBER COMPANY, and MILLER RUBBER COMPANY OF CALIFORNIA,  
Corporations,

Appellees.

STIPULATION IN RE TRANSCRIPT.

IT IS HEREBY STIPULATED and agreed by and between appellant and appellees in the above-entitled appeal by their respective counsel that the transcript on the appeal of Miller Rubber Company, a corporation, and the Miller Rubber Company of California, a corporation, appellants against Citizens Trust & Savings Bank, a corporation, as trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, appellees, may be used and serve as and for the transcript on this appeal to the same purpose and with the same effect as if a separate transcript had



been filed in this appeal. [15]

Dated December 31, 1915.

W. T. CRAIG,

DAVE F. SMITH,

NORMAN A. BAILIE,

Attorneys for Appellant.

BICKSLER, SMITH & PARKE,

Attorneys for Appellees.

[Endorsed]: Original. No. 1972—Bankruptcy. United States District Court, Southern District of California, Southern Division. Citizens Trust & Savings Bank, Appellant, vs. Miller Rubber Company et al., Appellees. Stipulation in re Transcript. Service of the within is hereby admitted this — day of —, 191—, Attorney for —. Norman A. Bailie, Suite 831, Higgins Bldg., Second & Main Sts., Los Angeles, Cal., Phones: Home 10112, Main 4622, Attorney for Appellant. Filed Dec. 31, 1915, at 10 min. past 2 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [16]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California.*

Clerk's Office.

No. —.

**CITIZENS TRUST AND SAVINGS BANK, a  
Corporation, Trustee,**

vs.

**MILLER RUBBER COMPANY and MILLER  
RUBBER CO. OF CAL., Corporations.**

**Praeipe [for Transcript of Record on Appeal of  
Citizens Trust & Savings Bank].**

To the Clerk of said Court:

Sir: Please issue a certified transcript of the record on appeal consisting of the following papers:

Petition for Appeal.

Order Granting Appeal.

Assignments of Error.

Citation on Appeal.

Stipulation in re Transcript.

W. T. CRAIG,

DAVE F. SMITH, and

NORMAN A. BAILIE,

Attorneys for Appellant.

[Endorsed]: Received copy of the within praecipe this 3d day of January, 1916. Bicksler, Smith & Parke, Attorneys for Appellee. No. 1972—Bankruptcy. U. S. District Court, Southern District of California. In the Matter of W. D. Newerf, Bank-

rupt. Praeceptum for Transcript on Appeal. Filed Jan. 3, 1916, at 50 min. past 4 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [17]

[**Certificate of Clerk U. S. District Court to Transcript of Record on Appeal of Citizens Trust & Savings Bank.**]

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*In the District Court of the United States, in and for the Southern District of California, Southern Division.*

No. 1972—BKCY.

In the Matter of W. D. NEWERF,

Bankrupt.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing seventeen (17) typewritten pages, numbered from 1 to 17, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the petition for appeal by the Citizens Trust and Savings Bank, a Corporation, trustee, assignments of error by said appellant, order granting appeal, stipulation in re transcript and *praeceptum* for transcript on appeal, in the above and therein entitled matter, and I do further certify that the same together constitute the record on appeal of said Citizens Trust and Savings Bank, a Corporation, trustee, as specified in said *praeceptum* for transcript on appeal.

I do further certify that the cost of the foregoing

transcript on appeal is \$6.00, the amount whereof has been paid me by the attorneys of record for the Citizens Trust and Savings Bank, a Corporation, trustee, the above-named appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand [18] and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 14th day of January, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence, the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer.

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
1/14/16. L. S. C.] [19]

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[Endorsed]: No. 2737. United States Circuit Court of Appeals for the Ninth Circuit. Citizens Trust and Savings Bank, a Corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, Doing Business as W. D. Newerf Rubber Company, Bankrupt, Appellant, vs. Miller Rubber Company, a Corporation, and Miller Rubber Company of California, a Corporation, Appellees. Transcript of Record.



Upon Appeal from the United States District Court  
for the Southern District of California, Southern  
Division.

Filed January 17, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Ap-  
peals for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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IN THE  
United States  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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The Miller Rubber Company, a  
corporation, and the Miller Rub-  
ber Company of California, a  
corporation,

*Appellants,*

*vs.*

Citizens Trust & Savings Bank, a  
corporation, as Trustee in Bank-  
ruptcy of the Estate of W. D.  
Newerf, doing business as W. D.  
Newerf Rubber Company, Bank-  
rupt,

*Appellee.*

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**OPENING BRIEF OF APPELLANTS.**

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W. SCOTT BICKSLER,  
W. C. SMITH,  
DALE H. PARKE,  
*Attorneys for Appellants.*



**No. 2737.**  
**IN THE**  
**United States**  
**Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT.**

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**The Miller Rubber Company, a  
corporation, and the Miller Rub-  
ber Company of California, a  
corporation,**

*Appellants,*

**vs.**

**Citizens Trust & Savings Bank, a  
corporation, as Trustee in Bank-  
ruptcy of the Estate of W. D.  
Newerf, doing business as W. D.  
Newerf Rubber Company, Bank-  
rupt,**

*Appellee.*

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**OPENING BRIEF OF APPELLANTS.**

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**HISTORY OF CASE.**

This is an appeal [p. 134] and a cross-appeal [p. 163] from the final order, decree and judgment of the District Court of the Southern District of California, Southern Division, on November 22nd, 1915 [p. 132], upon issues between appellants and appellee which



arose in the bankruptcy proceedings of W. D. Newerf, trading as W. D. Newerf Rubber Company [p. 60], for reclamation of personal property by appellants [p. 7 *et seq.*]. It is stipulated that the petition in bankruptcy against said W. D. Newerf was filed March 15th, 1915; that he was adjudged bankrupt April 9th, 1915, and that the amended petition herein was filed in said bankruptcy proceeding [pp. 6, 107-108].

The case is presented upon the pleadings, and such evidence as shows the errors complained of and objected to, duly allowed by order of the court [p. 158], and upon stipulation of counsel [p. 159].

The facts are as follows:

The Miller Rubber Company is an Ohio corporation, having its place of business at Akron, in the manufacture of automobile tires, accessories and other rubber goods [p. 62].

The Miller Rubber Company of California is a California corporation, organized for the purpose of acting as the agent in the handling and selling of the goods of The Miller Rubber Company [pp. 62-63].

W. D. Newerf, the bankrupt, was doing business in San Francisco, San Bernardino and Los Angeles under the name of the W. D. Newerf Rubber Company [p. 60].

On November 6th, 1911, The Miller Rubber Company entered into a contract with W. D. Newerf [p. 90] whereby it appointed W. D. Newerf its agent to handle its goods, consisting mostly of automobile tires and accessories. The Referee found, and appellee's counsel claim, that the entire controversy is circumscribed by this contract. In 1914, The Miller

Rubber Company of California was organized and a written contract was entered into between The Miller Rubber Company of California and the said W. D. Newerf [p. 95], together with a supplement thereto [p. 105] June 11, 1914.

It is specifically provided in the 1914 contract [p. 104] as follows:

“This contract and supplement shall supersede all contracts, agreements or understandings of any nature now existent between The Miller Rubber Company, or The Miller Rubber Company of California, and W. D. Newerf Rubber Company or W. D. Newerf, and such contracts, agreements and understandings shall be, and are considered null and void, except as to the unpaid accounts.” [See also p. 115, 1911 contract ended.]

The personnel of the Board of Directors of The Miller Rubber Company, and The Miller Rubber Company of California, is as follows:

Jacob Pfeiffer, president of both companies;

F. B. Theiss, treasurer of both companies;

William F. Pfeiffer, secretary and general manager of both companies [p. 38].

There was only one set of books kept to show the transactions of these two corporations, to-wit: the books of The Miller Rubber Company [pp. 38, 39, 145]; the account for goods shipped to The Miller Rubber Company of California, W. D. Newerf, being upon a memorandum slip and appeared on the books of The Miller Rubber Company no more than a memorandum. The memorandum was kept simply to show where the goods were that belonged to The Miller Rubber Company [p. 39]. Money deposited to the

account of The Miller Rubber Company of California was checked out to the account of The Miller Rubber Company. All of the property that was deposited with The Miller Rubber Company of California, W. D. Newerf, agent, belonged to The Miller Rubber Company, of Akron, Ohio. The same is true as to the money also [p. 39].

The record is replete with evidence that The Miller Rubber Company of California was organized solely to act as the agent of The Miller Rubber Company, and to comply with the law of California [pp. 27, 37, 38]. This is also shown in the findings of the Special Master [pp. 62, 63].

The bankrupt, W. D. Newerf, transacted all his business with The Miller Rubber Company, including the writing of letters and telegrams, with full and definite knowledge that in so far as the two companies being separate, *it was one and the same* [pp. 27, 31, 32, 47, 51, 52, 54, 58].

The Prudential Rubber Company appears nowhere in the proceedings (while we understand it was an agent of The Miller Rubber Company), and no issue is raised in any manner or form, either in its favor or against it. The entire controversy, therefore, is between The Miller Rubber Company, The Miller Rubber Company of California and the trustee in bankruptcy of the said W. D. Newerf.

The amended petition of appellants to recover the specific property was filed March 31st, 1915 [p. 8], and the answer of the trustee duly filed [p. 14]. This being previous to the adjudication in bankruptcy, the matter was referred to the Referee as Special Master

[pp. 17, 18]. Very early in the hearing the Special Master made an order [pp. 19-24] for the delivery of certain property upon the execution of a bond, which was given; and the property shipped since the taking effect of the 1914 contract was delivered to petitioners.

#### EVIDENCE.

Thereupon the hearing continued as follows: W. D. Newerf, the bankrupt, testified that he had on hand goods consigned to him under the 1911 contract [p. 25]; that he understood the purpose of the organization of The Miller Rubber Company of California, but that he was dealing with The Miller Rubber Company [pp. 26, 27], and in the handling of the goods of The Miller Rubber Company under the 1914 contract he "made no change in his system of books." He "still kept" his *stock cards* "just the same." That on August 1st, 1914, he "put in a new system entirely, a shorter system, but it was carried on in the same way as it had been before. The *cards* show the casings and tubes on hand the 1st of July, 1914, and as new goods came in they were put on the cards as they came in. The invoices came from Akron, Ohio" [p. 28]. He testified there was no sign in the store [p. 29] to indicate to the public the ownership of the property. Mr. Conlee testified that there were signs there with The Miller Rubber Company's name on [p. 40]. Mr. Conlee also testified there were certain of the same goods reconsigned to various people [p. 40].

The evidence further shows that The Miller Rubber



Company of California was organized to comply with the statutes of California.

That "goods were sold during the month to customers, the amount figured at the end of the month, and a statement sent to The Miller Rubber Company for the Miller goods, and that sales were made from the consigned stock of The Miller Rubber Company" [p. 26]. That notes were given in settlement thereof [pp. 26, 34].

All goods delivered under the 1914 contract were ordered returned to The Miller Rubber Company of California [p. 87].

The Special Master interpreted the 1911 consignment contract to be a sale, and that all goods delivered thereunder vested in the trustee in bankruptcy, of the value of \$7,685.23 [pp. 74, 75, 86].

#### COMMISSIONS.

The further controversy arose as to the interpretation of the contract of 1914 in reference to the commission which should be allowed to the bankrupt. The testimony of the bankrupt is that under the paragraph of said contract relating to commissions [p. 98] that his commission was 10-12½-12½-5% *from the list* attached to the contract. That the 5% "*terms*" on the invoices was a matter of The Miller Rubber Company's making, and an inducement for the customer to pay cash [pp. 29, 30]. The invoices read "5% 10th prox" [p. 30]. His testimony in relation to that was objected to as calling for a conclusion of the witness [pp. 30, 31] and *objection sustained*.

Mr. Charles R. Wetsel, Akron credit manager of The Miller Rubber Company, testified that the compensation of the bankrupt was to be the difference between the *actual selling price* and 10-12½-12½-5% off list price.

“Suppose you go to Newerf to buy a tire. He knows your credit is good and renders you a bill for \$100.00 worth of tires, but he gives you terms of 5% 10th prox., which means that the *actual selling price* of the goods is \$95.00. \* \* \* The Miller Rubber Company \* \* \* determine the basic price, 10-12½-12½-5% off \$100.00, is a certain amount, and deducting that certain amount from this \$95.00 is what he gets for his commission” [pp. 35, 36].

See letters [pp. 52, 53, 57, 58]. The letter of the bankrupt [p. 53] in relation to the manner of arriving at, and the amount of, commissions, shows he complied with the figures and conclusion of The Miller Rubber Company:

“However, we as stated in telegram are complying with your request and enclose you our note for \$1000.00 and our check for \$1058.16, this in accordance with our figures would be overpaying you about \$1000.00.”

Upon the question of commissions the Special Master found in accordance with the contention of the bankrupt by allowing commissions of the bankrupt to be the difference between the *list price* and 10-12½-12½-5% off [pp. 84, 85, 86]. By so doing he found against The Miller Rubber Company of California and ordered that it pay \$4495.25 [pp. 85, 87].

### PREFERENCE.

There is no evidence in the record that an issue as to any preference having been given was raised, but the Referee held that \$269.98 collected by The Miller Rubber Company subsequent to November 20th, 1914, must be returned to the trustee in bankruptcy [p. 88]. Upon this point one of the attorneys for the trustee stated: "We are not trying that now" [p. 40].

### REPORT OF AUDIT COMPANY.

The Special Master ordered an audit of the books to be taken [p. 21], and objections thereto were made by counsel for appellants [pp. 40, 120].

### DEPOSITIONS.

Notice to take depositions was duly given [pp. 108, 109], but the Special Master's report was filed July 13th, 1915, before the same could be taken [p. 90]. Thereupon, affidavits were made in reference to the depositions and the facts covered by them [pp. 110-121]; also a counter-affidavit [p. 122]; and notice of motion was also made to receive the depositions in evidence [pp. 155, 156]; but the order, decree and judgment of the court is self-explanatory that the depositions were not received in evidence [pp. 132-133].

### EXCEPTIONS TO REPORT OF SPECIAL MASTER.

The report of the Special Master [pp. 59-90], and exceptions thereto [pp. 123-132], were filed by appellants, to which we refer for the matters and things

therein objected to, and to which exception was duly taken. Upon hearing this report, the order, decree and judgment of the District Court is self-explanatory [pp. 132-133]. Thereupon, an appeal was duly taken by The Miller Rubber Company, and The Miller Rubber Company of California, upon assignments of error [pp. 141-155].

## THE LAW.

Assignments of error.

Brief of the argument.

### I.

**The said District Court erred in its finding, decision and judgment, under the evidence, and the law, that the title to said goods sought to be reclaimed was in the Trustee of said bankrupt estate and not in The Miller Rubber Company, the petitioner for reclamation. [p 141].**

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### Contract of 1911.

It was contended by counsel for the trustee that the contract of 1911 was still in force, and that goods received under that contract belonged to the trustee in bankruptcy. Both of these questions were resolved in favor of the trustee [pp. 62, 74, 86]. In the Special Master's conclusions of law there is no statement, however, that the contract of 1911 is still in force. One of the affidavits in reference to the depositions, proof of claim, etc., contains the facts in reference to the termination of the 1911 contract, and the arrangement for sale of the property under said contract [p. 115]. This is not controverted.



The appellants' contention is that the contract of 1911 was wholly superseded by the contract of 1914 [p. 104]. However, we present herewith the questions which arose upon the issues as to whether the contract of 1911 is a valid contract reserving title in appellants.

The main elements [p. 90] *showing reservation of title* are as follows:

*First.* W. D. Newerf was appointed *sole agent* to act in the capacity of *agent* in making sales of The Miller Rubber Company's tires.

*Third.* Appellants agreed to furnish bankrupt *on consignment* a stock of goods for the purpose of supplying customers.

*Fourth.* "Second party *expressly agrees* that *all goods*, or stock of goods, so furnished by the first party shall, at all times, be and remain *property of the first party until sold and delivered to bona fide customers in the usual manner.*"

*Fifth.* "Second party agrees to furnish first parties on the first of each month a complete inventory of all goods *belonging* to first parties in the hands of second parties"

or to permit first parties to "take inventory of stock on hand."

*Eighth.* All goods were delivered by The Miller Rubber Co. f. o. b. Los Angeles, San Francisco or Seattle.

*Ninth.* "It is further *distinctly* understood and agreed that second party *shall*, upon the expiration or termination of this agreement, or any renewal thereof, or upon its abrogation as herein provided, *surrender*

*and turn over to first parties all the property belonging to first parties of whatsoever nature, and shall make full and complete settlement and accounting to first parties for all property that may have been entrusted to second party's custody by virtue of this agreement."*

*Thirteenth.* First party to give credit to second party for any sales made in the territory of second party, of the difference between the net amount realized for said sales, and the net value of such goods charged at prices made second party by first parties.

*Fourteenth.* All replacements on first parties' tires and tubes to be under the control of first parties, and to be made from consigned stock of first parties; and to be made by second party at compensation of 10% of the amount received.

*Fifteenth.* First parties agree to pay second party actual cost for repair work done only on Miller tires and tubes.

*Sixteenth.* First parties agree to furnish second party free of charge all samples and advertising matter imprinted with name and address of second party.

*Seventeenth.* To allow the expenses of W. D. Newerf to Akron, Ohio, at least once each year.

The provisions of said contract which it is claimed evidence a sale are as follows:

*Sixth.* Second party will make monthly settlement for all purchases from and all shortages in stock of first parties. Remittances to be mailed to first parties on the 10th of each month for previous month's sales.

*Seventh.* When desired by second party, four months' drawing notes at 5% to be accepted by first parties in settlement for purchases made by second parties not exceeding \$25,000.00.

*Tenth.* Prices to second parties in accordance with a price list, Exhibit "A," less 10-5-5-5-5% on casings, and 10-5-5-5-5% on tubes.

*Eleventh.* Any reduction in prices by first parties at any time entitled second party to a credit from first parties for the amount of said reduction on all stock on hand.

*Twelfth.* First parties always to give second parties the lowest prices first parties give anyone for goods.

The first consideration to be given to this contract is the intent and meaning of the parties from reading all of its terms and provisions.

Helpful consideration is found in

Rushing v. Manhattan Life Ins. Co., 224  
Fed. 74.

The first syllabus is:

"Every part of a contract must be so construed, if possible, as to be consistent with every other part and effective. It is only when parts of a contract are so radically repugnant that there is no rational interpretation that will render them effective and accordant that any part must perish."

On page 76 the court say:

"The sole purpose of the interpretation of a contract is to ascertain the intention of the parties when they made it. If possible, every part of a contract must be so construed as to be consistent

with every other part and to have effect. It is only when the parts of a contract are so radically repugnant that there is no rational construction that will render them effective and accordant that any part must perish. And the intention of the parties must be deduced, not from specific provisions or fragmentary parts of the agreement, but from the entire contract, because the intent is not evidenced by any part or stipulation of it, nor by the contract without any part or provision, but by every part and term so construed, if possible, as to be consistent with every other part and with the entire agreement. American Bonding Co. v. Pueblo Inv. Co., 150 Fed. 17, 27, 80 C. A. 97, 107, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357; Jacobs v. Spalding, 71 Wis. 177, 188, 36 N. W. 608; Boardman v. Reed, 6 Pet. 328, 8 L. Ed. 415; Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64; O'Brien v. Miller, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469; Pressed Steel Car Co. v. Eastern Ry. Co., 57 C. C. A. 635, 637, 121 Fed. 609, 611; Uinta Tunnel etc. Co. v. Ajax Gold Min. Co., 141 Fed. 563, 73 C. C. A. 35; U. S. Fidelity & G. Co. v. Board of Com'rs, 145 Fed. 144, 148, 76 C. C. A. 114, 118."

Presenting the question, therefore, as to the proper interpretation of this contract, we are unable to comprehend the ruling that under the terms of this contract the title to the *goods on hand* vested in the bankrupt, and, therefore, now belong to the trustee in bankruptcy.

The most that can be said of this contract is that it takes one of two forms:

*First.* A contract of *conditional sale*; or, *second*, a



contract of *agency*, whereby the goods were placed on consignment, and title to "be and remain the property of the first parties until sold and delivered to *bona fide* customers in the usual manner" [p. 91].

Our interpretation of the contract, and the interpretation of the parties was, and is, a *contract of agency* [pp. 25, 26]. It will be noted that Mr. Newerf, the bankrupt, specifically stated that he received goods on consignment under the 1911 contract, and that "goods were sold during the month to various customers, and the amount was figured at the end of the month, and a statement was sent to The Miller Rubber Company for the Miller goods, and sales were made from the *consigned stock* of The Miller Rubber Company" [p. 26].

The stock cards were marked "consigned to W. D. Newerf Rubber Company, Los Angeles" [p. 28]. No change was made in the stock cards after the date of the 1914 contract [p. 28].

Adverting to the provisions of the contract which the trustee claims indicate a sale, we urge that said terms were no different than the terms in the contracts which were in issue in the cases we shall presently cite.

We interpret the contract to mean that the title to the goods passed only "to *bona fide* customers in the usual manner," but that instead of using the usual phrase that the agent, W. D. Newerf, should *guarantee* the sales, he was simply to make monthly settlements for said sales, remitting on the 10th for *previous month's sales* [par. sixth, p. 91]; and that in addition to this (upon the assumption that he would make sales upon time), he was allowed to give notes therefor [par.

seven, pp. 91, 92]; and the prices are shown in paragraph ten [p. 92].

Keeping in mind the terms of paragraphs fifth, sixth, seventh and tenth, *construed with the other terms of said contract*, we refer the court to the case of

Met. Nat. Bank v. Benedict, 74 Fed. 182,  
in which Mr. Justice Caldwell, speaking for the court, said:

“The money to be paid by the commission company was not upon a sale of the goods *to* that company, but upon a sale of the goods *by* that company. The commission company was never to pay for the goods as upon a *purchase by it*, but only to account for the proceeds of the sale of them at prices fixed by the contract.”

The cases within which the contract of 1911 clearly comes are as follows:

*In re Galt*, 120 Fed. 64.

In that case Mitchell & Lewis Company agreed to furnish Frank Galt “farm wagons, etc., 40% discount from their list prices.” “In *lieu* of discount from list prices, all wagons are to be settled for at net prices named on order blank hereto attached, or such prices as are named on other side of this sheet.” Further, wagons were to be sold and *accounted for in cash or purchasers’ notes*.

Syllabus:

“Whether a contract by which one party agrees to send to the other goods to be sold by him constitutes a bailment or a conditional sale depends on whether the sender has the right to *compel a*

*return of the thing sent*, or whether the receiver has the option to pay for the same in money.

“A manufacturing corporation entered into a contract by which it appointed a man its agent for the sale of its wagons at a place named. It agreed to furnish him with wagons at certain discounts from the list prices; the wagons to be sold by him and accounted for as sold in cash or purchasers’ notes. All notes taken were to be indorsed by the agent and sent to the company, and, in case they should be for a greater amount than the price of the wagons to be accounted for, the ‘surplus of commission’ contained therein was to be paid to the agent when and in proportion to the amount collected. All wagons not sold within 12 months were, at the option of the company, to be paid for by the other party in cash or by note, or to be turned over to the company. The contract further provided that the ownership of all wagons, or their proceeds, should remain in the company until settlement should be made therefor, and that the money and effects received in the course of the business of the agency should ‘in no case or under any circumstances be appropriated to the private use of the party of the second part.’ It also provided that the company might revoke the appointment at its pleasure, and at any time take possession of all or any part of the property. HELD, that such contract was one of bailment, and not of conditional sale, and that *on the bankruptcy of the agent the company was entitled to reclaim the goods remaining in his possession.*”

In the opinion, page 67, the court say:

“In bailment the identical thing delivered is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent

for the thing delivered, and there is *no obligation to return*. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.*, 7 C. C. A. 660, 59 Fed. 49. *The bailee may, however, by contract, enlarge his common-law liability without converting the bailment into a sale.*"

*In re Flanders*, 134 Fed. 560.

In that case the American Patent Leather Company had, for several years, sold leather to Flanders, the bankrupt. In 1903 he entered into a contract whereby said company consigned to him for sale upon commission; that he should make advances upon the consignment to the amount of 50% of the invoice value of the goods from time to time consigned, these advances to be made by his notes. These notes were negotiated by the company and were paid by the bankrupt at maturity. Flanders was to receive a commission of 5% on sales, *guarantee the sales*, and *to account monthly for the proceeds*, deducting freight charges and advances. The company had a right to the return of the goods upon demand upon repayment of advancements. Flanders sold the goods in his own name, and upon such terms as he saw fit, also took out insurance in his own name and in case of fire was to account therefor to the company.

The syllabus is:

"Where claimant shipped leather to a bankrupt under an agreement that he should sell it on commission, after making advances to the extent of 50 per cent on the invoice value, and account for the proceeds of sales, less a commission of 5 per



cent, freight charges, and advances, and guaranty such sales, the claimant being entitled to a return of the goods on demand, the transaction constituted a bailment, and not a conditional sale, though the bankrupt selected his own purchasers, insured the goods in his own name, and fixed the credits to be allowed, etc.”

John Deere Plow Co. v. McDavid, 137 Fed. 802.

This case is quoted more than any of the earlier cases upon the subject. In this case the goods were consigned under a contract. The provisions of the contract which would indicate it to be sale are as follows:

The bailee:

- 1st. To pay all transportation charges.
- 2nd. Furnish the warehouse room.
- 3rd. Pay all taxes, licenses, rents and other expenses.
- 4th. Keep the goods insured for their full value at the expense of the bankrupt.
- 8th. To render on the first of the month a report of all sales made the month previous, and to *accompany said report with a full settlement, in cash or customers' notes, which said notes the bankrupt agreed to pay.* The further provisions of said contract are that the title of said goods shall be and remain the property of the John Deere Plow Company. The syllabus is:

“Claimant contracted to consign goods to a bankrupt according to schedules and certain requests of the bankrupt, which agreed to pay transportation charges, furnish warehouse room, pay

taxes, licenses and rents, keep the goods insured, and be personally liable for any damage to goods while in its custody, to make all reasonable efforts to sell the goods, not to sell other makes to the exclusion of goods consigned under the contract, and to sell for enough more than the net schedule prices to pay freight, taxes, expenses, charges and commission for handling and selling the goods, which should be the difference between the net amounts and the gross amounts received from the sales. The contract expressly provided as to what warranties should be given, and entitled claimant to require the goods to be returned. The bankrupt ordered goods under this contract, agreeing to pay therefor in par funds or give notes, and agreed that the title and ownership of all goods should remain in the claimant, which should be subject to its order until paid for. HELD, that the contract was one of agency, and not a contract of conditional sale."

*In re Columbus Buggy Co.*, 143 Fed. 859.

This case has also been very extensively cited. The material terms of the contract in that case were that the goods should be *shipped and billed to the bankrupt as agent of the Columbus Buggy Company, at the latter's wholesale prices*; that the bankrupt might sell the goods at such prices as it saw fit and *pay the Columbus Buggy Company its wholesale price less 5% discount for the goods it sold each month by the 10th day of the succeeding month*; that it keep the property insured for the benefit of the Columbus Buggy Company, pay all expenses of freight, hauling and storage, and upon the expiration of the contract return that portion of the goods unsold, and that all goods should be on con-

signment, the title to remain in the Columbus Buggy Company "subject to its order *until they were sold and paid for in cash.*" The syllabus fully states the case:

1st Syl. "An agreed price, a vendor, a vendee, an agreement of the vendor to sell and of the vendee to buy for and pay the agreed price, are essential attributes of a contract of sale.

"The power to require the restoration of the subject of the agreement is an indispensable incident of a contract of bailment."

2nd Syl. "The fact that a *contract* provides that the *receiver of goods is to account for those sold at fixed prices* and to retain the difference for insurance, storage, commission and expenses does *not* make the contract an agreement of sale."

3rd Syl. "A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will *account and pay for the goods sold at agreed prices*, that he will bear the expenses of insurance, freight, storage and handling and that he will hold the merchandise unsold subject to the order of the furnisher, discloses an agreement of *bailment* for sale, and does *not* evidence a conditional sale."

Dunlop v. Mercer, 156 Fed. 545.

This was a petition to reclaim goods pursuant to a contract under the terms of which the Zimmer Company *in selling goods* to the Western Company did so with the distinct understanding that the title to them should remain in the Zimmer Company until all accounts and notes of the Western Company were paid in cash. On page 548 the court say:

“The provision of this contract that the title to the goods delivered under it should remain in the vendor until the notes and accounts of the vendee had been paid in cash, and that when they were so paid the vendor would execute a bill of sale of the goods remaining in the vendor’s possession, discloses the intention of the parties to impose, and effectually imposes, the precedent condition of the payment of the notes and accounts of the vendee upon the vesting of the title to the property in the Western Company.”

The syllabus is:

1st Syl. “A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its reversion in the seller is subject to a failure of the buyer to comply with a condition subsequent.

“An agreement that the purchaser will buy and *pay for merchandise*, that he may sell it in the regular course of his business, but that the proceeds shall be applied as a credit or as collateral security to the debt of the vendee at the option of the vendor, and that the latter will sell and deliver the goods on condition that the title to them shall remain in him until the notes and accounts of the vendee are paid in cash, is a valid contract of conditional sale.”

2nd Syl. “An option in the purchaser to pay, or to refuse to pay, for the property, is not essential to a conditional sale.”

*In re Pierce*, 157 Fed. 757.

The contract there provided (a) that the bankrupt should receive all implements, pay the freight charges, (b) store and insure them at their full value and be



liable for damages thereto, and keep the company harmless from all charges. (c) In case the bankrupt failed to sell the implements received he should either *pay for those unsold at prices fixed*, or hold them subject to the order of the company by reshipment or redelivery to the company free of freight and charges. The bankrupt, not the company, had the choice of these alternatives. (d) The bankrupt to sell upon terms specified, and not to deliver to purchaser before fully settled for by cash or note, and *to be responsible to the company for the regular price of any put out without settlement*. (e) To remit the company all cash received on sales, less commission, and to make settlement for all implements ordered under the contract upon the close of the season or whenever requested. (f) The bankrupt was to guarantee the notes of purchasers. (h) The implements were to be sold on commission and to remain the property of the company until sold. The first syllabus is:

“A contract under which a company delivered machinery to a bankrupt for sale, which provided that the title to the machinery and its proceeds when sold should remain in the company, that the bankrupt should receive, keep and insure the property, pay all charges thereon, and sell the same at certain prices and on stated terms only, and remit the proceeds to the company less a commission which was to be the difference between the invoice and selling price, and gave him an option to pay for or return such as remained unsold at the close of the selling season, was one of bailment for sale, and not of sale, and the company may reclaim such of the property as passed into the hands of the bankrupt’s trustee.”

Franklin v. Stoughton Wagon Co., 168 Fed.  
857.

In that case a contract was made to deliver wagons on consignment, which contract is set forth in the opinion. We call the court's attention to the following provisions of the contract:

(8) The bankrupt agreed to make out and render to the petitioner on the first of each month a full report of *sales made the month previous*, showing the amounts received in cash and the amount sold on time, and to accompany said report with a full *settlement for all goods so reported sold*, said settlement to be made with cash less 5% for all cash sales, and *promissory notes at four months*, secured by good collateral paper bearing 7% interest after maturity.

(9) To furnish the Stoughton Wagon Company satisfactory security to secure the payment of all obligations or evidence of debt arising under said contract, whether due or not.

It was further agreed that the title and ownership of all the goods were to remain with the wagon company.

That the bankrupt agreed to give to the wagon company a *note for net amount of goods on hand*, per statement, due in six months' time, all amounts paid, together with cash discount of 5%, to be endorsed on back of note. For goods unsold at end of six months a new note to be given.

The court reviews the cases and quotes from some we have already cited, and holds:

“A contract, under which a wagon company shipped wagons to a dealer to be sold so as to realize to such dealer the freight, expenses and a commission above listed price to be settled for at such price when sold either in cash or in purchasers’ notes *guaranteed by the dealer*, and which provided that until sold the wagons should remain the property of the company and subject to shipment on its order at any time on repayment of actual freight and charges paid thereon, was one of bailment and not of conditional sale, and on the bankruptcy of the dealer the company had the right to reclaim the wagons remaining unsold from his trustee.”

*In re Gray*, 170 Fed. 638.

In that case goods were sold under a contract, partially set forth at page 642, by which the bankrupt agreed to make *settlement within ten days from date of invoice, either in cash or by notes*. It was further provided that the title to the goods should remain in the petitioner until the indebtedness should be *paid in money*.

The court quotes from Encyclopedia of Law, vol. 6, p. 440, as follows:

“Sales of personal property on condition that title is not to vest in the purchaser until the payment of the purchase money, or upon some other condition, are of very frequent occurrence, and the validity of such sales as between the parties thereto is unquestioned. \* \* \* In most jurisdictions, in the absence of fraud, the rule is the same as to third persons, though in some states it is held otherwise, and in a number of states all

conditional sales must be recorded in order to be valid against third persons without notice.”

And from vol. 6, p. 475, as follows:

“Where a sale is made on condition that the vendee shall give a note or other security for the price, the property and the goods so sold and delivered does not vest in the purchaser until the condition is complied with or waived. But title does not necessarily pass when a note is given before the note is paid.”

And from the note:

“The giving of a note for a balance due on the price of property sold, with the reservation of title until payment, will not vest title in the vendee in the absence of an express agreement.”

*It will be observed that in this case, and the one previous, Franklin v. Stoughton Wagon Company, supra, prima facie a sale for cash or notes, unequivocal, except that title was reserved by another provision of the contract.*

On appeal the District Court set aside the order of the Referee and held:

5th Syl. “In the absence of a fraudulent intent, a conditional sale reserving title to the goods in the seller until the price is paid, is not invalid as against creditors or purchasers because the goods were furnished for resale.”

6th Syl. “A conditional sale contract required payment in 10 days, either in cash or notes, declaring that all notes and open accounts shall be drawn payable at Oklahoma City, with 10 per cent attorney’s fees added, and that on default in the



payment of any installment the seller might consider the entire indebtedness due; that the title to and the ownership of all the goods should be in the seller until the buyer's indebtedness had been paid in money. HELD, that the word 'money' was used in contradistinction to 'notes' and did not include notes, so that the acceptance of notes did not constitute a payment sufficient to vest title to the goods in the buyer."

*In re Bailey*, 176 Fed. 628.

In that case the petitioner, The Parian Paint Company, agreed to furnish the bankrupt paints and supplies *on consignment*; the bankrupt agreeing to keep an itemized statement of all goods sold by him, *and to pay for the same when sold, at the end of every sixty days*, and to return to petitioner, when called upon, all supplies which he had on hand.

The Referee denied the petition to reclaim the property. On appeal the Referee was reversed, and the court held:

2d Syl. "Where goods were in fact shipped to and held by a bankrupt under a valid consignment contract, to be sold as agent, and not otherwise, the fact that he subsequently gave notes for their price for the accommodation of the payee, which were not enforced, but renewed when due, he being called on only to account for the goods sold, is not conclusive that the contract was changed into a sale."

*In re Smith*, 192 Fed. 574.

In that case fertilizer was delivered to the bankrupt to sell in the ordinary course of business at prices set

forth, all of which were to be the property of the fertilizer company until the proceeds of sale were turned over to it, and all *notes* given, either by the agent or purchaser, were paid. The contract further provided:

“Spring settlement. Prices in first column net cash July 1st. Prices in second column settlement by note dated July 1st, with interest, and due not later than December 1st, 1911.”

At the time each shipment was made the company sent the agent a bill or statement in the ordinary form, showing him “in account with said company.” He had sold some fertilizer for cash and received payment therefor; some had been sold and had not been paid for; and some was still on hand. The court held:

“A written contract under which a fertilizer company shipped fertilizers to a bankrupt for sale shortly before his bankruptcy, HELD on its face to be one of consignment to him as agent, and to entitle the company to reclaim the fertilizer remaining on hand and the amounts collected by the trustee for that sold, in the absence of any course of business between the parties tending to show that the contract was in fact one of sale.”

And further ordered that the fertilizer company was entitled to such sums as the receiver or trustee had collected from purchasers of the fertilizer, and the proceeds of the fertilizer sold by the receiver, less expense.

*In re Farmers' Co-operative Co.*, 202 Fed. 1005.

The court held:

2nd Syl. “That a conditional sale contract under which property was delivered to a bankrupt was not recorded as required by the laws of the

state until within four months prior to the bankruptcy does not deprive the seller of the right to reclaim the property if unpaid for, since, never having become the property of the bankrupt, the contract could not operate as a 'preferential transfer' within the meaning of Bankruptcy Act July 1, 1898, c. 541, p. 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by act Feb. 5, 1903, c. 487, p. 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506)."

Wood M. & R. Co. v. Vanstory, 171 Fed. 375.

This case is a precedent, as the court discusses the questions under consideration. In that case certain mowing and reaping machinery was placed with one Vanstory, the bankrupt, for sale.

On page 380 the court say:

"It was also shown that the bankrupt occasionally disposed of these machines held under this contract, and, in each instance, the machines thus disposed of were charged to the bankrupt. In some cases, however, appropriations of this kind were not shown until the yearly inventory was taken, at which time the bankrupt was required to make settlement for the same."

We further especially refer the court to the opinion and language quoted from *Foreman v. Drake*, 98 N. C. 311.

The first syllabus is sufficient for the present controversy:

"Petitioner, a manufacturer of farm machinery, shipped machines by the car load to the bankrupt, which was a hardware company, under a contract by which the bankrupt received and stored the

same and from time to time shipped machines out on orders from petitioner. The machines were not charged to the bankrupt, nor invoiced as part of its stock, but it was paid an agreed price for storage and transfer. It had the privilege of selling any of the same to its own customers, *and machines, when sold, were charged to it.* At the end of the year an inventory was taken by petitioner of the machinery then on hand in storage. HELD, that the transaction was a bailment, the title remaining in petitioner, and that on the bankruptcy it was entitled to reclaim possession of the machines on hand from the bankrupt's trustee."

L. C. Smith Co. v. Alleman, 199 Fed. 1.

1st Syl. "Claimant delivered a typewriter to a bankrupt under a contract providing that it was hired for the term of seven months at a rental of \$100 payable in installments, the machine to be returned to claimant at the expiration of the term or on default of any payment, and that at the expiration of the term, on payment of \$1.00 in addition to the sum paid for rental, the claimant would execute a bill of sale of the machine to the bankrupt. HELD, that the writing on its face constituted a good bailment, and not a conditional sale."

2nd Syl. "Where the words of a written contract are equivocal, evidence of the subsequent acts of the parties thereunder is admissible to show how they understood the contract, on the theory that such acts are a binding practical construction thereof; but, if the meaning of the contract is clear, the intention of the parties must be determined by the language, and evidence of a practical construction is inadmissible."



3rd Syl. "While the mere use of the words 'lease' and 'rental' in a written contract relating to personality will not convert into a bailment what would otherwise be a conditional sale, yet, even in a contest where execution creditors are concerned, if the contract by its term is a bailment, the courts will give it effect as such to the exclusion of the execution creditor."

4th Syl. "To constitute a contract a conditional sale of personal property, the title thereto must have passed to the buyer when the property was received into its possession."

5th Syl. "Claimant leased a typewriter to a bankrupt under a written contract for hire for the term of seven months at a rental of \$105, payable \$30.00 on the execution of the agreement and monthly installments thereafter. It also provided for the return of the machine at the end of the time or on default, and in case the payments were fully made the bankrupt was to be entitled, in consideration of the further payment of \$1, to a bill of sale at the end of the term. HELD, that the fact that payments of unequal amounts were made and accepted at irregular intervals up to a time shortly before the intervention of bankruptcy proceedings, and the failure of the bankrupt to return the machine at the end of the term, and of the claimant to pursue its remedy to retake the same until six months after the expiration of the term and after the intervention of bankruptcy, did not change the contract from one of bailment to a conditional sale so as to deprive the claimant of its right to recover the property against the bankrupt's trustee."

It is interesting to note that this is a case arising in the United States Court in Pennsylvania, under the

law of which state reservation of title, conditional sales and like contracts are void as against creditors; and that the United States Courts follow the local law upon the subject.

*In re Reynolds*, 203 Fed. 162.

In that case the Birdsell Mfg. Co. filed a petition to reclaim certain property in the possession of the trustee. The fourth clause of said contract is as follows:

“Agent shall, on the first day of each month, and when requested to do so by the company, or its duly authorized representative, render a statement showing all goods on hand, and all goods sold during the preceding month, and shall at once settle for goods sold, in cash, at the invoice price thereof, less a discount of five per cent. In case agent shall sell any wagons on time, he may settle with company for same by executing his note due in four months, without interest, for the invoice price of goods sold, and in such case shall not receive five per cent discount; but the amount of unpaid notes owing by agent to the company shall not at any time exceed the sum of \$100.00.”

On page 164 the court say:

“The fourth clause of the contract is mostly relied upon in support of the position that it was a conditional sale. By virtue thereof undoubtedly on the 1st day of each month all notes and accounts for wagons sold on time became the property of the bankrupt. The bankrupt at that time had to account for all goods sold during the preceding month, and for such as were sold on time he could settle to the extent of \$100 by executing his four months’ note without interest. But this did *not* have the effect of making a *sale of such goods as had not been sold*. In case of *Parlett v.*

Blake (C. C. A. 8th Cir.), 26 Am. Bankr. Rep. 25, 188 Fed. 200, 110 C. C. A. 72, 39 L. R. A. (N. S.) 620, it was assumed that an agency contract, containing a provision that at the expiration of its term the agent should buy all goods not theretofore sold at the then current prices, was not a sale contract before the expiration of the term. It became such only upon the expiration of the term as to goods then unsold. So here this contract, otherwise an agency contract as to goods *not* sold, is *not* made a *sale contract* as to them because on the 1st day of each month it became a sale contract as to the proceeds of goods sold during the preceding month on time. I think, however, that the petitioner's right is *limited* to the *unsold goods*. He has none as to the proceeds of goods sold because of this fourth clause.

"The order of the Referee is reversed, with directions to allow petitioner the unsold goods claimed by it."

Berry Bros. v. Snowdon, 209 Fed. 336 (U. S. C. C. A. 9th Cir.).

In that case the Referee rejected the claim of the appellant for certain goods placed on consignment. The contract, among other things, provided:

"The party of the second part agree to report on the first of each month the amount of goods sold by them from said stock for which party of the first part will render an invoice at the regular terms and prices of such goods according to the quantity sold."

And again as follows:

"The party of the first part will render a memo invoice to the party of the second part of all goods shipped on consignment, and will credit to such con-

signment account the amount of goods that are sold each month from said stock, and the party of the second part agree to pay for such goods sold by them or taken from consigned goods while in their possession on the terms which they are billed by the party of the first part on their regular invoice."

On page 339 the court say:

"The invoices, or 'detailed statements' as they are called in the stipulation of the parties, did not change the terms of the written agreement under which the property was sent to the consignees. 'An invoice,' as said by the Supreme Court in *Dows v. National Exchange Bank*, 91 U. S. 618, 630 (23 L. Ed. 214), 'is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity and cost or price of the things involved, and it is as appropriate to a bailment as it is to a sale. \* \* \* Hence, standing alone, it is never regarded as evidence of title.' See, also, *Sturm v. Boker*, 150 U. S. 312, 328, 14 Sup. Ct. 99, 37 L. Ed. 1093.

"And that neither of the parties to this contract considered that it was in truth anything more, than it purported to be, to-wit, a mere consignment of the goods for sale upon the terms and conditions therein stated."

The syllabus is as follows:

"Claimant shipped to bankrupts, who owned a warehouse for the storage of goods and also a salesroom at a different place in the city where they sold goods, certain goods under a contract which stated that the goods were 'consigned for sale.' Pursuant to the terms of the contract claimant paid the freight on the goods, cartage to the



warehouse where they were stored, and also storage and insurance thereon. An invoice or detailed statement of the goods was sent to bankrupts, who had the privilege of removing any of them to their store for sale when desired, sending a statement of the goods removed each month to claimant, which then sent them a regular invoice charging them with the goods so removed. From time to time claimant, with the knowledge of bankrupts, withdrew parts of the goods and sold them on its own account, and within four months prior to the bankruptcy it withdrew all that remained. HELD, that the contract was not one of sale, either absolute or conditional, but of bailment, under which title did not pass to any of the goods except those removed by, and regularly billed to, bankrupts."

*In re Killian Mfg. Co.*, 209 Fed. 498.

The syllabus sufficiently states the case and the law:

"Where a bank, in accordance with custom, furnished credit to purchase silk, taking title thereto in its own name and delivering the same to certain bankrupts for manufacture under a trust receipt binding the bankrupts to hold the goods, or the proceeds thereof, for the bank until the purchase price was paid, the title never passed to the bankrupts, and their agreement while insolvent to return the goods to the bank was not a preference."

This is another case arising in Pennsylvania, where the state court decisions hold that conditional sale contracts, and the like, are void as to creditors.

*In re Grand Union Co.*, 219 Fed. 353.

In that case the Grand Union Company, engaged in

selling pianos on the installment plan, contracted with the Hamilton Investment Company, by which the former agreed to “sell” and the latter agreed to “buy” from time to time piano leases on certain terms. The Grand Union Company having become bankrupt, it was contended by the Hamilton Investment Company that all money that had been collected belonged to it. Upon a careful construction of the contract the Circuit Court of Appeal for the second circuit held it was not an absolute sale of the leases, but a transfer as security for the loan. The first syllabus is:

“A ‘sale’ is a transfer of property in a thing for a price in money. The transfer of the property in the thing sold from buyer to seller for a price is the essence of the transaction, and the transfer is a transfer of the general or absolute property, as distinguished from a special property, in the thing.”

General Electric Co. v. Brower, 221 Fed. 597  
(C. C. A. 9th circuit).

This is a very recent case which came before this Honorable Court, and is conclusive of the case at bar.

Mr. Justice Gilbert, in beginning the opinion, says:

“It is the contention of the appellee that where goods are delivered by a manufacturer to a seller, and the latter is *allowed to place them with his stock of goods*, and sell and dispose of them in the ordinary course of business, to manage and control them as other goods, and where he pays all the taxes, cartage, storehouse charges, and all other expenses in connection therewith, and *agrees to pay for such goods so disposed of*, and there is neither an agreement to return the goods nor an

agreement to account for the proceeds of the sale of goods as such, there is no bailment."

(The court refuses to follow Penny & Anderson, 176 Fed. 141, as inapplicable to the case, and which case will be cited by counsel for the trustee in bankruptcy.)

The contract, among other things, provided:

1. The agent guaranteed that all lamps sold by it would be paid for.

2. The agent assumed liability for loss.

3. The payment of certain expenses.

4. The payment of insurance.

5. No provision that the agent should keep the money arising from said sales separate and apart from its other money.

6. No provision that the agent should turn over the money received from the sale to the manufacturer.

7. The agent was to pay for the lamps sold each month, less 29% for making the sales. The said provision is in paragraphs 5 and 7 of said contract as follows:

"The agent shall be allowed, as compensation for the performance of all obligations hereunder, the difference between the amounts received from the sale of the lamps and their value on the basis of a discount of 29% from list prices as to the time fixed by the manufacturer."

"At the time for rendering each such report the agent shall pay to the manufacturer the value of all lamps lost from the aforesaid stock, or damaged, on a basis of list prices less a discount of 29%."

The syllabus is:

“By a contract between a manufacturer of incandescent lamps and the A. Company, it was appointed as agent to sell such lamps, and accepted such appointment. The contract further provided that the manufacturer should maintain a stock of lamps in the custody of the agent; that the quantity of lamps and the length of time they should remain in stock should be determined by it; that all the lamps should remain its property until sold; that the proceeds of sales should be held for its benefit; that the agent should return lamps unsold to the manufacturer at any time, if directed; that the agent should sell at prices and on terms fixed by the manufacturer and state on all bills and invoices that it was agent for the manufacturer; and that the agent guaranteed payment for all lamps sold and would pay to the manufacturer each month an amount equal to the sales value of lamps sold, less the agent's compensation, which was to be the difference between the selling prices and the value of the lamps at a discount of 29% from list prices. HELD, that there was an agency and not a sale, and, upon the bankruptcy of the agent, the lamps in its possession did not pass to its trustee in bankruptcy, though the contract contained no provision that the agent should keep the proceeds of sales separate and apart from its other money, or that it should turn over the money received to the manufacturer, and though it did provide for payment by the agent of all expenses in the storage, cartage, transportation, handling and sale of the lamps and all expense incident thereto.”



8. Paragraph 6 of the contract [p. 599] provides:

"The agent shall pay over to the manufacturer, not later than the 10th of every month, an amount equal to the total sales value of all lamps sold hereunder, less the compensation due the agent, for which collections have been made by the agent during the preceding calendar month, and a further amount equal to the total sales value, less the compensation due the agent on all lamps sold by the agent to customers whose accounts covering such lamps are, on the first of the month, past due, according to the manufacturer's standard terms of payment."

*Ellet-Kendall Shoe Co. v. Martin*, 222 Fed. 851.

In that case a stock of shoes was placed with Brown & Norris, who afterwards became bankrupt. The agreement provided:

1. Brown & Norris to guarantee the sales.
2. Keep the stock insured.
3. All unsold stock might in the future be taken back.
4. Make weekly reports accompanied by check in payment of goods sold.
5. That said assignment account should be fully settled in six months, "or a final settlement shall be made in less time than six months if it can conveniently be done."

On page 855 the court uses significant language from the case of *Sturm v. Boker*, 150 U. S. 329:

"The recognized distinction between bailment and sale is that when the identical article is to be returned in the same, or in some altered form, the contract is one of bailment and the title to the property is not changed."

On page 855 the court further say:

“They made such an agreement, which is essentially a contract for the consignment of the goods to the bankrupts for sale on commission, and both parties acted upon it prior and up to the bankruptcy as being such a consignment upon the terms specified in that agreement. It should not *now* be held a contract of sale and purchase of the goods for the benefit of the general creditors of the bankrupts, unless its terms imperatively require that it be so held.”

On page 856 the court quotes very decisive language. Mr. Justice Caldwell, speaking for the same court, in *Met. Nat'l Bank v. Benedict*, 74 Fed. 185:

“Moreover, parties have the undoubted right to make their own contracts, and to put their own construction upon them, and to regulate their rights and liabilities thereunder. If the court ‘leaves the parties to be governed by their understanding of their own language, it, in effect, enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice.’ \* \* \* And when both parties to a contract, acting in good faith, are agreed as to its meaning, and their rights under it, a stranger having no interest in the subject matter of the contract cannot insist that a different interpretation shall be put upon it, or compel the parties to put that interpretation upon it, which will benefit him. \* \* \* This is not a case where the parties to the contract themselves differ as to its meaning and purpose. Here the parties are agreed that the contract they made was one of bailment. It is a third party who is demanding that the contract

shall not have effect according to the agreement and intention of the parties. On this state of facts the bill of sale invested the bank with the rights of the commission company only; and, as the commission company had no right to the property, the bank has none."

The first syllabus is:

"Whether a contract under which a stock of shoes was shipped was a sale, or merely a consignment for sale, must be determined from the terms of the contract, the test being whether the specific goods were to be returned if not sold, or another thing of value might be returned instead."

The court held that the referee erred in denying the claim of the petitioner to the shoes in controversy, and reversed the decree of the District Court, with directions to allow the claim of the petitioner to the shoes; or, if sold, to award the petitioner the value thereof.

*In re National Home & Hotel Supply Co.*, 226 Fed. 840.

In that case the points urged in favor of the trustee's contention are the following:

"(1) There was no reservation of title to the proceeds of the goods sold, nor was bankrupt required to keep separate or remit the identical money taken in on sales of petitioner's goods, and bankrupt co-mingled such proceeds with its general funds. (2) Bankrupt paid the freight. (3) Petitioner's wares were not kept separate from other goods in bankrupt's store. (4) Bankrupt fixed the retail price and terms of sale. (5) Sales made by bankrupt of petitioner's wares conveyed good title to the purchaser. (6) No ex-

press provision in the agreement relating to the returning of unsold goods. (7) Petitioner desired to protect herself. (8) Petitioner did not expressly reserve for herself the right to sell the goods. (9) Only the first invoice was marked 'Consignment' by petitioner. (10) There were no restrictions on sales. (11) Bankrupt took a discount from the list price in remitting. (12) Goods were shipped for the purpose of resale. (13) Bankrupt sold in its own name. (14) No accounting was had for the month of July. (15) Petitioner did not carry insurance on the merchandise."

On page 845 the court say:

"I consider the fact that there was no obligation on the part of the bankrupt to pay for any *unsold* goods, and no right reserved in the petitioner to *compel* bankrupt to pay therefor, to be the greatest obstacle in the way of establishing a sale with a reservation of title as contended by counsel for trustee. I think the particular nature of the wares in question is peculiarly adapted to a contract of consignment. While there is nothing in the record on the subject, we all know that hand-painted china, like hand embroidery, is often handled as a side line and under an agreement of agency and consignment.

"In addition to the foregoing, and supporting petitioner's theory, the conduct of the parties, from beginning to end, shows, not only that they considered the transaction a consignment, but that they actually in good faith lived up to the agreement that they had made and treated the goods as consigned goods."



The syllabi state the facts and the law:

1st Syl. "Where a transaction between a manufacturer and a retail dealer, adjudged a bankrupt, created a *bona fide* agency and consignment contract, which was performed, the manufacturer could reclaim the merchandise from the trustee."

3rd Syl. "In determining whether a contract between a manufacturer and a retail dealer, adjudged a bankrupt, was one of agency and consignment, so that the manufacturer could reclaim the merchandise from the trustee, or a sale with a reservation of title as security, unaccompanied by any proper instrument filed or recorded, so that the trustee could retain the merchandise, the court must take into account what manner of contract the parties intended to make, what they agreed to do, and the manner in which they carried it out in actually working under it."

4th Syl. "A retail dealer opened negotiations with a seller of hand-painted china, suggesting consignments. The seller selected the merchandise, shipped it, and kept the dealer supplied without orders from him. An accounting was given by the dealer after 30 days, and he was required to pay only for pieces sold. The merchandise remained the property of the seller until sold. The parties by conduct showed that they considered the transaction a consignment. The dealer presented to the seller an accounting, headed 'Sold for (Seller).' The seller did not take out insurance on the merchandise, which was commingled with other goods. The dealer failed to give the merchandise a separate department as agreed, but the seller was ignorant of it, and all the merchandise bore the name of the seller. No person was defrauded by the transaction. FIELD, that the

merchandise was consigned to the dealer, and, on his being adjudged a bankrupt, the seller could reclaim articles on hand from the trustee, notwithstanding Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838, and the trustee must also pay the proceeds of any merchandise sold by the receiver, and account for merchandise sold by the dealer prior to filing of petition in bankruptcy and not accounted for; so that the seller might participate to that extent as an unsecured creditor."

The second syllabus has no bearing upon the case at bar because under California law no instrument is required to be filed or recorded.

Ludvigh v. American Woolen Co., 231 U. S. 522, 31 Am. Bankr. Rep. 481.

In that case goods were consigned by a woolen company to Horowitz & Son, who afterwards went into bankruptcy. The woolen company having taken some of the goods from the bankrupts prior to the institution of the proceedings in bankruptcy, a petition was filed against the woolen company to recover therefor. The District Court held in favor of the trustee, which ruling was reversed by the Circuit Court of Appeals for the Second Circuit, which decree was affirmed by the Supreme Court of the United States.

The provisions of said contract bearing upon the subject under consideration are as follows:

"IV. Said party of the second part (the Niagara Company) agrees to sell such merchandise to such persons as they shall judge to be of good credit and

business standing, and to collect for and in behalf of the party of the first part (the Woolen Company), all bills and accounts for the merchandise so sold, and to immediately pay over to the said party of the first part any amount collected as aforesaid, immediately upon its collection, minus, however, the difference between the price at which said merchandise so collected for has been invoiced to the party of the second part, and the price at which said merchandise has been sold as aforesaid by the party of the second part.

“V. Said party of the second part does hereby guarantee the payment of all bills and accounts for merchandise, possession of which is delivered to it under this agreement, and it hereby agrees, in case any merchandise delivered under the provisions of this agreement by the party of the first part to the party of the second part is not accounted for to the party of the first part under the provisions of clause IV, of this agreement, to pay to the party of the first part the invoice price of said merchandise, and thereupon title to said merchandise, or to the proceeds thereof, so paid for, shall pass to the party of the second part, and shall then be exempted from the provisions of this agreement.

\* \* \* \* \*

“VIII. This agreement shall continue for one year. If, for any reason, this agreement terminates, all of the merchandise, possession of which is held by the party of the second part under this agreement, shall at said termination be immediately returned to the possession of the party of the first part.”

In relation to these provisions, paragraph V, standing alone, would indicate a sale was indicated, second party to pay the first party the invoice price for the merchandise “and thereupon title to said merchandise,

or to the proceeds thereof, so paid for, shall pass to the party of the second part." Construing these sections together the court say:

"That part of section 5 relating to goods not accounted for refers specifically to the provisions of clause 4 of the agreement, which deals with goods sold only. The entire contract must be read to ascertain the purpose of the parties, and we find in clause 8, limiting the agreement to one year, the provision that if for any reason the agreement terminated, *all* of the merchandise, the possession of which was held by the Niagara Company under the agreement, should be immediately *returned* to the Woolen Company. \* \* \* We find that the agreement was really one of bailment for the purpose of sale, with the right to return the unsold goods. There is nothing illegal in such contracts when made in good faith."

It was further insisted that the conduct of the parties showed their real purpose and understanding were to make an effectual sale. The following matters and things were relied upon to show a sale:

1. Horowitz selected the goods, whereas under the contract the Woolen Company had the right to turn over any it saw fit.

2. A letter from an agent of the Woolen Company in answer to a request to take back goods "contained the statement that the Woolen Company could *not*, at that date, consent to have fall goods, made expressly for the Horowitzs, and delivered in accordance with the terms of the agreement, turned back in the stock."

3. That the goods were not kept separately, but the tags of the Woolen Company were left upon the goods.



The evidence in the case at bar shows that the goods were tagged [p. 33] and that there were signs up with The Miller Rubber Company's name on [p. 40].

The court then say: "Against these considerations are the positive terms of the agreement found to be free from fraud, and fairly entered into, which, as we interpret them, permitted *goods unsold to be returned*," and closes:

"We are unable to find that this contract was either actually or constructively fraudulent, and hold, as was found in the Circuit Court of Appeals, that it was what it purported to be,—a consignment arrangement with the net proceeds of sales to be accounted for to the consignor, and with the right to return the unsold goods. Finding no error in the decree of the Circuit Court of Appeals, the same is affirmed."

See also

Bryant v. Swafford, 214 U. S. 279, syllabus and opinion.

#### CALIFORNIA CASES.

Assuming that the question hinges upon the law of California, with reference to reservation of title in a consignor of goods, or reservation of title in a conditional sales contract, we submit the following California cases:

Rodgers v. Bachman, 109 Cal. 552;

Wise v. Collins, 121 Cal. 147;

Van Allen v. Francis, 123 Cal. 474.

In the latter case the first syllabus is:

“Conditional sales of personal property are recognized in this state to the fullest extent, and even *bona fide* purchasers from the person to whom personal property is delivered under an executory contract of conditional sale, get no valid claim to the property.”

Lundy v. White, 128 Cal. 170.

The second syllabus is:

“In case of a conditional sale, a purchaser who has broken the conditions upon which the sale was made can transfer no rights to a purchaser or mortgagee of the property conditionally sold, and the vendor may replevy the property from the possession of a purchaser and mortgagee of the vendee.”

Under these cases it is apparent that if the case arose in the California courts to construe the contract of 1911, that The Miller Rubber Company would have the undoubted right to recover the goods.

#### CASES CITED BY APPELLEE.

Because of the early hearing of this case it is probable that the appellants will not have time, under the rules, to print and file a closing brief; and for that reason submit herewith the cases which it is understood counsel for appellee will cite.

Penny & Anderson, 176 Fed. 141.

This Honorable Court has disapproved the ruling in that case in the very recent case of General Electric Co. v. Brower, *supra*.

*In re Garcewich*, 8 Am. B. R. 149.

That case arose under a petition to reclaim certain goods. The case is poorly reported because it cannot be ascertained what the terms of the contract were. It is stated that "the goods were sold to the bankrupt by the United Shirt & Collar Company *upon credit*, and upon the understanding that the title to such of them as should not be sold by the bankrupt should remain in the vendor until the payment of the purchase price." The sale of the goods *upon credit* "is inconsistent with the continued ownership of the vendor"—as stated by the court in the opinion—and so far as can be gathered from the case, it is held that the property vested in the trustee in bankruptcy. If it could be argued that the case went further than this it is clearly and unmistakably opposed to the overwhelming weight of authority on the subject.

*In re Miller & Brown*, 14 Am. B. R. 439.

That case arose in Pennsylvania, and the court held that the transaction was "nothing more than what is known in the law as a contract of 'sale and return,' and the title to the unsold portion of the goods so consigned, on hand at the date of adjudication, passes to the trustee in bankruptcy." The facts further show "the right to return did not depend upon bailment, but upon the mere will of the consignee, however moved," and that the contract was a sale and the title vested. The case, therefore, is clearly distinguishable from the cases applicable to the facts in the case at bar.

*In re Harriet v. Wells*, 15 Am. B. R. 419.

In that case the bankrupt having fallen behind in

her payments, it was agreed that the goods on hand should be consigned to her. The court held that as to these goods "there could be no such shifting over from one account to the other as was attempted"; and that as to said goods "on hand at the time, or subsequently sent to her \* \* \* they were invoiced and charged to her by the Silk Company at definite prices"; that she "was only to be responsible for what she sold, having the privilege—or being obliged, if you will—to return what she did not. On the other hand, she had the right to retain the whole by paying the price, which practically made it what is known in the law as a case of 'sale or return,' in which the title passes to the party to whom the goods are to be delivered, subject to the option of returning them if he so desires."

The facts clearly distinguish the case, therefore, from the facts in the case at bar.

*In re Harrington*, 32 Am. B. R. 828.

That was a petition to reclaim certain automobile parts in the possession of the trustee in bankruptcy. The case is distinguishable from the case at bar as found by the court, by the facts as follows:

1. That neither of the parties understood or believed that the terms of the contract were to be lived up to.

2. No reservation in the vendor in the proceeds of the sales, or as to insurance, or mingling the parts with other goods.

3. The provisions of the contract "as to the retention of title were not insisted upon by the vendor, and were waived, as is plainly indicated by the letter of



October 31st, 1912, contained in the agreed statement of facts.”

The above case came before the Circuit Court of Appeals in the case of Flanders Motor Co. v. Reed, 33 Am. B. R. 842, and as gathered from the opinion the case is distinguishable from the case at bar as follows:

1. Nothing to show the course of dealing that was followed.

2. No provision as to the proceeds of the sales.

3. No provision that the parts remaining unsold at the end of the year should be returned to the vendor, the court, for that reason, differentiating it from Ludwig v. American Woolen Company, *supra*.

4. “No provision to prevent the vendee from consuming the goods, or selling them and applying the proceeds to his own use, and *In re* Garcewich therefore applies.”

John Deere Plow Co. v. Mowry, 34 Am. B. R.  
384.

That case arose upon a petition to recover certain personal property, and the case is clearly differentiated from the case at bar:

1. As to the manufacturer’s warranty.

2. No goods to be returned by the vendees.

3. No countermand of the order could be made.

4. Full purchase price matured in case of death, insolvency, fire loss, or selling out the business.

5. The vendee to give purchase notes which must be secured.

6. The reservation of title in company based upon a separate consideration.

Accordingly the court held that the provisions of the contract *amounted to a chattel mortgage*, and that the instrument should have been *recorded*; and because it was not recorded it was invalid against the trustee in bankruptcy.

We urge, therefore, that none of these cases, cited by counsel for appellee, are applicable to the facts in the case at bar; and that if such a construction might be placed upon any one of them, the ruling there is clearly contrary to the law upon the subject as shown by the cases which we have cited.

#### CONCLUSION.

We urge, therefore, that The Miller Rubber Company is entitled to the goods under the 1911 contract, upon the following grounds:

*First:* Because it reserved title thereto, and that this provision is especially applicable to all goods on hand, and unsold.

*Second:* That no fraud is shown, and no course of dealing had grown up between the parties, indicating a different intention.

*Third:* Because the bankruptcy proceedings necessarily terminated all contracts between the parties—the only provision in the bankruptcy law in that respect being in section 2, clause 5, authorizing a trustee, under orders of court, to conduct a business for a limited period.

II.

**The said District Court erred in its finding, decision and judgment, under the evidence, and the law, that the contract and transaction therein set forth between said bankrupt and said petitioner, for reclamation, constituted a sale of the said goods by the petitioner to the said bankrupt.**

This error is correlative to the first point or assignment of error; and we, therefore, respectfully refer the court to the cases cited thereunder, and urge that the court erred in holding that the transaction under the contract of 1911 constituted a sale of the *goods on hand* by The Miller Rubber Company to the bankrupt.

III.

**The said District Court erred in failing to find, under the evidence and the law, that the title to all of said goods in the hands of said bankrupt or in transit on July 1, 1914, was and is in the petitioner for reclamation, and that the said petitioner for reclamation had and has a present right to all of said goods, wares and merchandise.**

This assignment of error is also correlative to the first assignment of error, except that herein we make an affirmative assignment of error that the court erred in failing to find that The Miller Rubber Company has the present right and title to all of the goods, wares and merchandise. The statement of the facts, and the cases relied upon in the first assignment of error, correctly state the rule upon the subject under consideration.

IV.

**The said District Court erred in not finding, under the evidence and the law, that the contract of June 11, 1914, and the supplement thereto, between the petitioner, The Miller Rubber Company of California, and the said bankrupt, superseded and annulled the said contract of November 6, 1911, as aforesaid.**

This point is materially important because we claim that the contract of 1911 was wholly superseded and annulled by the express provision of the contract of 1914.

Let us review the facts briefly to show the situation of the parties:

1. The officers of The Miller Rubber Company, and The Miller Rubber Company of California:

Jacob Pfeiffer, president of both companies.

F. B. Theiss, treasurer of both companies.

Wm. F. Pfeiffer, secretary and general manager of both companies [p. 38].

2. Only one set of books were used to handle the business of both companies [p. 38].

3. All property belonged to The Miller Rubber Company [pp. 39, 149, 151, 154].

4. The bankrupt knew and understood that The Miller Rubber Company of California was organized to act solely as the agent of The Miller Rubber Company, and, "that so far as being a separate corporation, it was just the same corporation. Only organized in that way to comply with the laws of this state" [p. 27].

5. The Special Master found that The Miller Rubber Company of California was organized for the purpose of acting as the agent in handling and selling of



the goods of The Miller Rubber Company [p. 63]. The Special Master also found that the officers of the two companies are the same, and that The Miller Rubber Company of California was owned and controlled by the stockholders of The Miller Rubber Company, of Ohio [p. 63].

6. The bankrupt dealt with Mr. Wetsel as the representative of The Miller Rubber Company in the preparation of the contract of 1914 [p. 27].

7. The business of the bankrupt was at all times carried on between him and The Miller Rubber Company in the same way except that a shorter system was put in by the bankrupt [pp. 28-29].

8. The letters and telegrams were sent by the bankrupt to The Miller Rubber Company under the contract of 1914 [pp. 31, 32, 47, 51, 52, 58].

9. Goods were received from The Miller Rubber Company, of Ohio, marked The Miller Rubber Company of California, since the beginning of the contract of 1914 [p. 27].

10. The Prudential Rubber Company nowhere appears in the proceedings, and the rights of the parties are to be determined without regard to said company.

11. The contract of 1914 specifically provides:

"This contract and supplement shall supersede all contracts, agreements or understandings of any nature now existent between The Miller Rubber Company, or The Miller Rubber Company of California, and W. D. Newerf Rubber Company, or W. D. Newerf, and such contracts, agreements, and understandings shall be, and are considered null and void, except as to the unpaid accounts."

12. The contract of 1911, and the contract of 1914, are actually signed by Wm. F. Pfeiffer for The Miller Rubber Company and The Miller Rubber Company of California, respectively, and both are actually signed by W. D. Newerf, the bankrupt.

Notwithstanding the provision of the contract of 1911 that it shall remain in force until November, 1916 [p. 94], it must be true, beyond peradventure, that the contract of 1914 wholly annulled and superseded the contract of 1911.

To illustrate: Supposing it were claimed in this proceeding by The Miller Rubber Company, that The Miller Rubber Company of California is not only a distinct entity, but that it had no relation, and that it is not the agent of, The Miller Rubber Company? A statement of the foregoing facts, which would be admitted by the parties to be true, will lead the court to the conclusion that The Miller Rubber Company of California was appointed as the agent of The Miller Rubber Company, of Akron, Ohio; and, therefore, that it not only had the right and authority to make the contract of 1914, but to cancel all other previous contracts between the parties, or in which the parties were interested pertaining to, and covering the subject matter under consideration, to-wit: the agency and sale of goods of The Miller Rubber Company, in California.

The record is replete, as shown by the findings of the Special Master that the parties have, at all times, acted under the contract of 1914 since it went into effect [Special Master's report, pp. 26-40, 78, 79, 80, 85, 87].

We urge, therefore, that the contract of June 11th, 1914, legally annulled and superseded the contract of November 6th, 1911; and that the contract of 1911, therefore, entirely falls from view in the consideration of the case.

#### ALLEGATIONS OF AMENDED PETITION.

It is proper, at this time, to call the court's attention to the allegations of the amended petition, seeking the recovery of goods delivered between June 1st, 1914, and March 17th, 1915 [p. 8]. It is our contention that, in view of the foregoing facts, to-wit: the annulment of the contract of 1911 by the contract of 1914, that, by a fiction of the law, all goods held by the bankrupt under the 1911 contract passed to his possession under the 1914 contract, and were necessarily held under said contract, and not otherwise; and that the allegations were properly framed to cover goods delivered under the 1914 contract only.

#### V.

**That said District Court erred in its finding, decision and judgment, that the said contract of November 6, 1911, between the petitioner and the bankrupt, is still in force and effect.**

This is a correlative error of the one just stated, and we respectfully refer the court to the argument and reasons assigned under the fourth point herein.

VI.

**The said District Court erred in not finding, under the evidence and the law, that the trustee in bankruptcy herein, by taking possession of the property in the hands of said bankrupt or in transit on June 11, 1914, and attempting to sell and dispose of all of said property, and in making no attempt to carry on the business, would necessarily abrogate and did terminate the said contract of November 6, 1911, if it had had any force and effect after June 11, 1914.**

Counsel for The Miller Rubber Company were required to appear in court to prevent the trustee from selling the goods alleged to have been received under the 1911 contract [p. 115]. This would clearly indicate the intention of the trustee not to attempt to carry on the business as provided by section 2, clause 5, of the Bankruptcy Act, which he might have done for a limited period. This is assigned as another reason why the contract of 1911 was necessarily abrogated and terminated.



VII.

The said District Court erred in not finding, under the evidence and the law, that the contracts and transactions therein set forth between the petitioner and the said bankrupt constituted and appointed the said bankrupt the agent of The Miller Rubber Company (or ostensibly the agent of The Miller Rubber Company of California) for the sale of all goods on hand or in transit on July 1, 1914; and that the title to all of said goods in the hands of said bankrupt or in transit on July 1, 1914, and now in the hands of the trustee in bankruptcy herein, and remaining unsold, was and is in the petitioner, The Miller Rubber Company, for reclamation.

Upon this point we urge that the court should have found as claimed in our first assignment of error, that the title to all goods in the hands of the bankrupt, at the date of the filing of the petition in bankruptcy, to-wit: March 19th, 1915 [p. 6], was vested in The Miller Rubber Company, and that its petition to reclaim said goods should be sustained.

We further respectfully refer the court to the cases and argument under the first assignment of error.

VIII.

**That said District Court erred in its finding, decision and judgment that The Miller Rubber Company of California is a distinct entity from The Miller Rubber Company, of Ohio, and in all the matters and things involved herein, it must be so adjudged, upon the ground that The Miller Rubber Company of California was and is at all times the agent of The Miller Rubber Company and that said bankrupt knew and understood at all times that all of his said transactions and contracts were, in reality, with the parent corporation, The Miller Rubber Company.**

Upon this point we respectfully refer the court to the fourth point, and to the argument thereunder, which shows that the business was transacted between The Miller Rubber Company and the bankrupt.

IX.

**That said District Court erred in its finding, decision and judgment, under the evidence, that The Miller Rubber Company, the petitioner herein, obtained and had a preference from said bankrupt in the alleged sum of two hundred sixty-nine and ninety eight hundredths (\$269.98) dollars, or in any other sum.**

Referring the court to the subject matter under consideration, to-wit: the reclamation of goods [pp. 8-16], the question of there having been a preference and the requirement that it should be returned [p. 88] was wholly beyond the jurisdiction of the Special Master, and was not within the issues. This is referred to [p. 40] upon the question of the accounts between the parties, and counsel for the trustee stated: "We are

not trying that now.” Objection was made to this in the report of the Audit Company [pp. 40, 120, 125, 129]. The exception on page 129 clearly stated the point as appears of record. See also transcript, pages 114, 120. The question of whether there was, or was not, a preference, would come before the court under section 57 of the Bankrupt Act; and the proceedings in court to determine that question would arise under section 25 of the Bankrupt Act, whereas the proceedings herein arose under section 24—a wholly separate and distinct subject matter and proceeding.

## X.

**The said District Court erred, under the evidence, in its finding, decision and judgment, that no consent was given to the said bankrupt to make application of commissions that might be due to him (ostensibly from The Miller Rubber Company of California) from The Miller Rubber Company, as against the amount owing by him on open account or notes to The Miller Rubber Company of California or The Miller Rubber Company.**

The Special Master's report [p. 78] shows how this question arises, and held that The Miller Rubber Company does not have the right to apply on the indebtedness of Newerf to The Miller Rubber Company, commissions falling due after November 16th, 1914, upon the ground that the application, if any, was made without the bankrupt's consent [see pp. 54, 55]. We especially call the court's attention to the day letter from the bankrupt to The Miller Rubber Company, of November 12th, 1914 [p. 32]:

“DAY LETTER.

Los Angeles, 11-12-14.

The Miller Rubber Company,  
Akron, Ohio.

New notes mailed per your request. Agreeable to apply our commissions on open account. Return to us all notes for which we have sent renewals. Writing.

W. D. NEWERF RUBBER Co.”

This letter did not indicate that the commissions alleged to be due from The Miller Rubber Company of California to the bankrupt were to be applied upon the open account between The Miller Rubber Company and the bankrupt, to November 16th, 1914, only. It further indicates that new notes were mailed showing an extension of time given to the bankrupt upon notes [pp. 54 and 55]. It contemplates, aside from the question of law, the *contractual right* of The Miller Rubber Company to apply said commissions on the amount due to The Miller Rubber Company from the bankrupt. So, too, upon the question of law, The Miller Rubber Company would have the right to apply upon its claim against the bankrupt, any commissions due to the bankrupt from The Miller Rubber Company of California.

Keeping in mind the facts stated in our *fourth* point, and the ultimate fact, to-wit: that The Miller Rubber Company of California at all times was, and is, the agent of The Miller Rubber Company, it is clear that any money ostensibly due from The Miller Rubber Company of California to the bankrupt is properly credited by The Miller Rubber Company upon the amount due to The Miller Rubber Company from the bankrupt. If that conclusion were not true, The Miller



Rubber Company would be placed in the anomalous position of being bound by the acts of its agent as to any obligations which might accrue *against* it to the bankrupt; but at the same time not protected in any rights accruing to *it* from the same contract.

## XI.

**The said District Court erred in not allowing the depositions of the petitioners in relation to all matters in controversy between The Miller Rubber Company and the bankrupt to be read in evidence.**

Upon this point we refer the court to the transcript as follows: Pages 108-123, 144-156. The depositions as shown in the transcript at the foregoing pages, will establish the right of The Miller Rubber Company to all of the property in dispute, and *will also establish its proof of CLAIM* in the bankruptcy proceedings, which has been suspended pending this appeal. The depositions do further establish the right of mutual set-off [pp. 117, 153], and the claim of The Miller Rubber Company [pp. 119, 145-153]. The question of the *amount* of the claim of The Miller Rubber Company, in the bankruptcy proceedings, was not within the jurisdiction of the Special Master, and not within the issues. We urge that the Special Master erred in refusing to allow the depositions to be read into evidence, and that the District Court erred upon the same ground; and that said depositions should be received in evidence to establish the right and title of the Miller Rubber Company to the goods claimed, and also for the purpose of ultimately proving claim in the bankruptcy proceedings.

XII.

**The said District Court erred, under the evidence and the law, in its finding, decision and judgment denying the petition for reclamation, and in affirming the order theretofore made by the Special Master denying said petition.**

The order and decree against appellants should be reversed upon the following grounds:

1. Because the title to all property claimed in this proceeding at all times was, and is, vested in The Miller Rubber Company under the contract of 1911.

2. That there was no fraud in said contract, and no course of dealing had grown up to make said contract fraudulent as to the creditors of the bankrupt.

3. That the contract of 1914 between the duly authorized agent of The Miller Rubber Company, to-wit: The Miller Rubber Company of California, and the bankrupt, annulled and superseded the contract of 1911.

4. That all property claimed by appellants herein, was held by bankrupt under the 1914 contract, and belongs to The Miller Rubber Company.

5. That in all of these matters and things the Special Master and the District Court erred, and the order and decree should be reversed.

Respectfully submitted,

W. SCOTT BICKSLER,

W. C. SMITH,

DALE H. PARKE,

*Attorneys for Appellants.*

### BRIEF OF APPELLEE.

Because this case was set for an early date, to-wit: March 17th, and as we may not have time, under the rules of the court, to file an answer brief in the appeal of the trustee herein, we submit an argument upon the questions at issue, determined adversely to the trustee in bankruptcy upon its appeal herein [p. 168], from the order and decree of the District Court reversing the Special Master, ordering the payment by The Miller Rubber Company of California to the trustee in bankruptcy of \$4495.25.

The order of the court approved the Special Master's report, except as to the commissions, in which it was disallowed [pp. 132, 133]. In a conversation between the court, counsel for trustee and The Miller Rubber Company, the court stated that his intention was to reverse the Special Master upon this order of \$4495.25 against The Miller Rubber Company of California, and upon that understanding the appeal was prosecuted by the trustee in bankruptcy [p. 168].

This controversy arises over the true construction to be placed upon the commissions allowed to the bankrupt under the contract of 1914 [p. 98].

The Special Master goes into this question [pp. 83-86], and finds "the sale was actually at the *list price* without deducting the 5% for cash, and that his commissions should be figured on the discounts allowed of 10-12½-12½-5% from *list prices* [p. 84]. Upon this basis there is a difference between the bankrupt and The Miller Rubber Company of \$4495.25."

It is the contention of The Miller Rubber Company that the commission due to the bankrupt is "the dif-

ference between the prices at which goods are *actually* sold \* \* \* and the price of 10-12½-12½-5% from The Miller Rubber Company's 1914 *list price* [p. 98]; and that the price at which the goods are actually sold is the amount of *money received* by the bankrupt for an invoice, less the discounts legally and actually allowed. "The actual selling price is \$100.00 less the 5%, so that it is \$95.00 that is used as the *actual* selling price instead of \$100.00" [p. 35].

The bankrupt complied with this manner of computing the commissions, by his remittance of September 14th, 1914 [p. 53]. There is no dispute in the figures of The Miller Rubber Company showing the amount of commissions for July, 1914 [see Night Letter, p. 54], unless it would be the letter of the bankrupt of October 15th, 1914 [pp. 58, 59].

The finding of the Special Master was excepted to by The Miller Rubber Company [pp. 126, 127]. The depositions show how the commissions were computed [bottom p. 145, 146, 152].

The contract of 1914 itself furnishes the rule to determine this question, and the District Court rightly interpreted it. If the parties had meant that the commissions of the bankrupt should be the difference between the *list price* and 10-12½-12½-5%, they would have employed language showing that was their intention; and in that case the contract would have read that the bankrupt's commission is to be the difference between the *list price* of The Miller Rubber Company and 10-12½-12½-5%, but we do urge, that the language employed intends that the commission is to be the difference between the amount of money received



for the goods and  $10-12\frac{1}{2}-12\frac{1}{2}-5\%$  from the *price list*. The ultimate result is the difference of 5% on the *business done for cash*, and from *all* the evidence the District Court must have so found, and amounts to \$4495.25. Upon this point the District Court correctly construed the contract, and its decree should be affirmed.

### CONCLUSIONS.

Upon the reversal of the order and decree, we suggest that the following:

1. That the contract of 1914 between the parties annulled and abrogated the contract of 1911;
2. That all property on hand at the time the contract of 1914 went into effect was possessed and held by the bankrupt under said contract;
3. That the petition herein was properly filed by The Miller Rubber Company to recover the property as being held by the bankrupt under the 1914 contract.
4. That the property on hand be ordered delivered to The Miller Rubber Company.
5. That the District Court be reversed as to the alleged preference of \$269.98, upon the ground that it had no jurisdiction of the subject matter, and that the question was not within the issues.
6. That the order of the Special Master, and the affirmance thereof by the District Court as to the amount of the claim of The Miller Rubber Company, and The Miller Rubber Company of California, or either of them, in the bankruptcy proceedings, be reversed, upon the ground that the questions relating thereto are not in issue herein.

7. That the District Court be reversed in its approval of the report of the Special Master as to the legal entity of the two corporations, to-wit: The Miller Rubber Company and The Miller Rubber Company of California, and directed that the real parties in interest, and between whom the controversy must be determined, are: The Miller Rubber Company and the trustee in bankruptcy of W. D. Newerf.

8. As a corollary to the last mentioned suggestion, that as to all business between The Miller Rubber Company of California, and the bankrupt, the right of set-off existed in favor of The Miller Rubber Company.

9. That in all events, the bankruptcy proceedings would, and did, terminate the contract of 1911.

10. That the depositions be read in evidence to properly assist the court in determining the further issues between the parties herein.

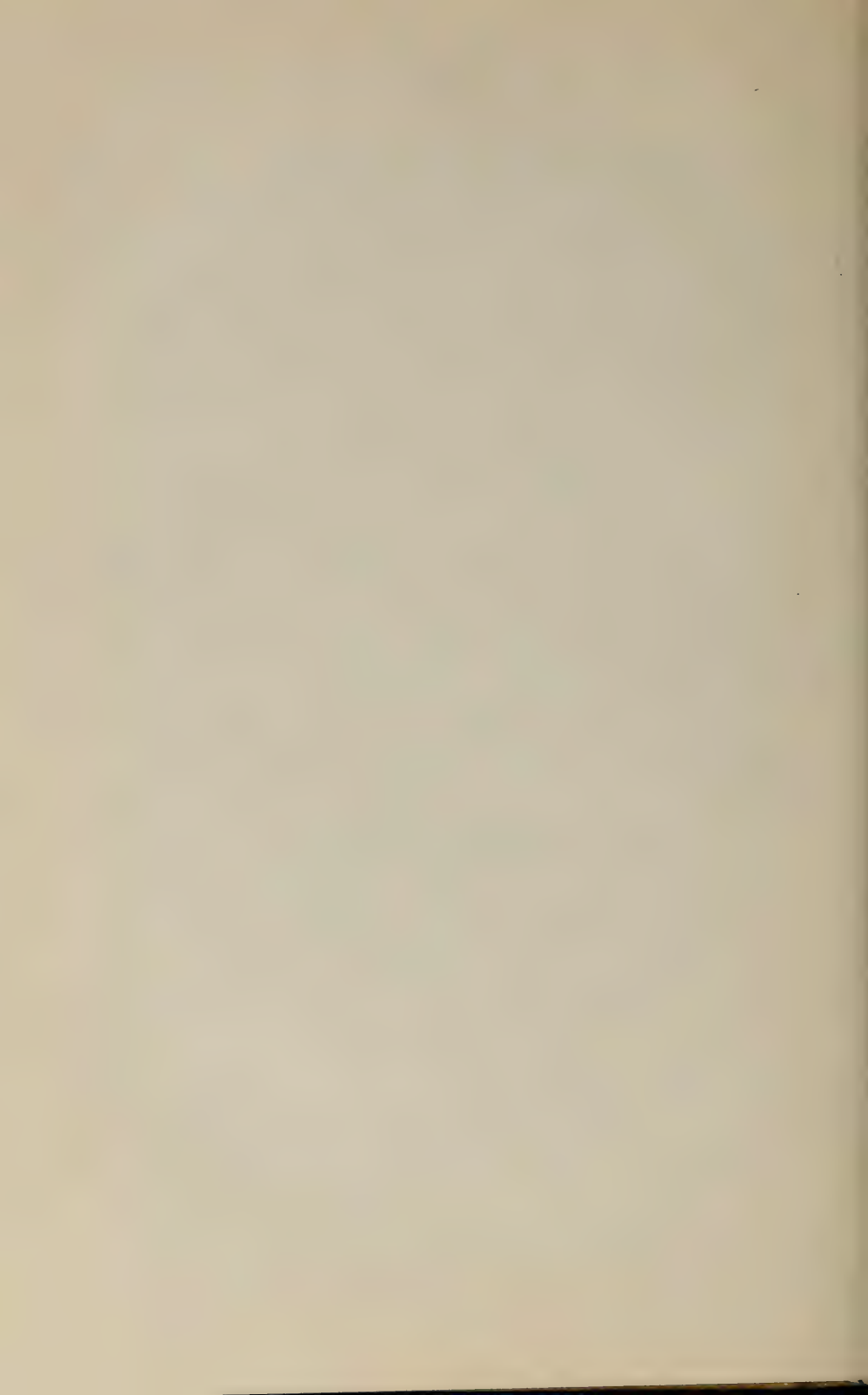
Respectfully submitted,

W. SCOTT BICKSLER,

W. C. SMITH,

DALE H. PARKE,

*Attorneys for Appellees.*



IN THE  
United States  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUTT.

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The Miller Rubber Company, The  
Miller Rubber Company of Cali-  
fornia, corporations,

*Appellants,*

*vs.*

Citizens Trust and Savings Bank,  
a corporation, as Trustee of the  
Estate of W. D. Newerf, doing  
business as W. D. Newerf Rub-  
ber Company, Bankrupt,

*Appellee.*

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Reply Brief of Appellee and Brief of Cross-Appellant  
Citizens Trust and Savings Bank, Trustee.

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W. T. CRAIG,  
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*Attorneys for Citizens Trust and Savings Bank, Ap-  
pellee and Cross-Appellant.*

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**Circuit Court of Appeals**

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*Appellee.*

**Reply Brief of Appellee and Brief of Cross-Appellant  
Citizens Trust and Savings Bank, Trustee.**

On March 19, 1915, an involuntary petition in bankruptcy was filed against W. D. Newerf, doing business as W. D. Newerf Rubber Company, and the Citizens Trust & Savings Bank was appointed receiver of his estate, and after adjudication, was duly elected trustee of said estate. Immediately upon the receiver's taking charge, The Miller Rubber Company, and The

Miller Rubber Company of California, filed a petition in reclamation, claiming to be the owners of certain automobile tires and accessories in the possession of the receiver. The controversy was by the court referred to Honorable Lynn Helm, referee in bankruptcy in and for Los Angeles county as special master, and the issues raised by the amended petition [Fols. 8 and 9], and the answer of the receiver [Fols. 10 and 11], and the stipulation relative to the allegations of the amended petition entered into in open court, were tried before him.

On the hearing it developed that The Miller Rubber Company of Ohio and the bankrupt had entered into a contract on November 6, 1911 [Fols. 80-83], and that at the time of the filing of the petition in bankruptcy herein, certain of the goods shipped to bankrupt under said contract, and consisting of automobile tires and accessories were still on hand. It also appeared that The Miller Rubber Company of California and the bankrupt had entered into a contract which was to take effect as of July 1, 1914 [Fols. 84-93], and that certain of the goods shipped under said contract and also consisting of automobile tires and accessories were on hand. It also developed that there was a controversy between the bankrupt and The Miller Rubber Company of California as to the method of computing the compensation of W. D. Newerf under the contract of July 1, 1914. The result was that the special master ordered an accounting by the Mushet Audit Company, and also ordered that all goods shipped under the 1914 contract be at

once delivered to The Miller Rubber Company of California. This was done, and automobile tires and accessories to the amount of approximately \$50,000 were delivered.

The audit showed that there were on hand at the time of the filing of the petition in bankruptcy goods shipped under the 1911 contract to the amount of \$7,685.23, and the special master found that under the law these goods became part of the bankrupt estate, and passed to the trustee. The Miller Rubber Company and The Miller Rubber Company of California filed exceptions to the special master's report.

The special master also found that there was due to the bankrupt from The Miller Rubber Company of California on account of commissions the sum of \$4495.25. He therefore recommended to the court that judgment go against The Miller Rubber Company of Ohio for the possession of the goods on hand shipped under the contract of November 6, 1911, to the amount of \$7,685.23 and against The Miller Rubber Company of California for unpaid commissions amounting to \$4495.25. He also assessed the costs amounting to \$1407.34 against the petitioners.

The Miller Rubber Company and The Miller Rubber Company of California filed exceptions to the special master's report, and the matter was argued orally before the Honorable Robert S. Bean, judge of the District Court of the United States, sitting in the Southern district of California, Southern division. The court affirmed the report of the special master as to the title to the merchandise, but overruled said re-



port as to the commissions. He also divided the costs equally between the petitioners and the trustee.

The Miller Rubber Company and The Miller Rubber Company of California perfected an appeal to this court from that part of the decision of the District Court awarding the goods to the trustee; and the trustee, Citizens Trust & Savings Bank, filed a cross appeal from that part of the decision overruling the special master's report as to the commissions amounting to \$4495.25.

Both parties have prepared assignments of error; those of The Miller Rubber Company and The Miller Rubber Company of California will be found set out in their brief on file herein. The assignments of error of the Citizens Trust and Savings Bank, trustee, are hereinafter set forth.

### **ASSIGNMENTS OF ERROR.**

Comes now Citizens Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, bankrupt, respondent for the reclamation of certain goods, wares and merchandise in the hands of the said trustee, and petitioner on appeal to the United States Circuit Court of Appeals for the Ninth circuit, from the order and final decree of the above entitled District Court, made and entered November 22nd, 1915, and reversing the decree and order of the special master declaring that said trustee is entitled to recover from The Miller Rubber Company of California, or its bondsman, the sum of forty-four

hundred ninety-five and 25/100 dollars (\$4495.25), the amount of commissions found by said special master to be still due bankrupt from said Miller Rubber Company of California, and herewith makes the following assignments of error:

(1) The said District Court erred in its finding, decision and judgment under the evidence and the law that there was not due and owing to said trustee from The Miller Rubber Company of California the sum of forty-four hundred ninety-five and 25/100 dollars (\$4495.25), or any other sum, as commissions still due bankrupt from The Miller Rubber Company of California, against which there was no offset whatsoever.

(2) The said District Court erred, failing to find as a matter of law under the evidence that the actual selling price of goods sold by W. D. Newerf, agent of The Miller Rubber Company of California, under the contract of June 11th, 1914, was the amount at which said merchandise was billed, whether or not the customer purchasing said goods took advantage of the five per cent (5%) discount offered for cash.

(3) The said District Court erred in its finding, decision and judgment that the actual selling price of the goods sold by W. D. Newerf, agent of The Miller Rubber Company of California, under the contract of June 11th, 1914, where goods were sold for cash, was the invoice price of said goods less the five per cent (5%) allowed for cash.

Wherefore, said respondent for reclamation prays that the order of final decree and judgment of said District Court reversing the finding of the special master herein that the said trustee in bankruptcy is entitled to recover from The Miller Rubber Company of California, or its bondman, the sum of forty-four hundred ninety-five and 25/100 dollars (\$4495.25), the amount of commissions still due bankrupt from The Miller Rubber Company of California, against which there is no offset whatsoever, be reversed, and that the said District Court may by mandate, be directed to enter a final order and decree to the effect that the Citizens Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, do have and recover of and from The Miller Rubber Company of California, a corporation, or its bondsman, American Surety Company, a corporation, the sum of forty-four hundred ninety-five and 25/100 dollars (\$4495.25), and allowing all of the other matters and things in which it is herein set forth and alleged that the said District Court erred.

The argument on the cross-appeal of the Citizens Trust and Savings Bank, trustee, will be first taken up; and afterwards that in reply to the brief of The Miller Rubber Company and The Miller Rubber Company of California.

### **BRIEF OF APPELLANT.**

An agreement was entered into between The Miller Rubber Company of California and W. D. Newerf

[Fols. 84 to 91, inclusive], and a supplemental agreement was also entered into bearing the same date [Fols. 92 and 93], by the terms of which agreement and supplemental agreement, The Miller Rubber Company of California *employed* Newerf to sell its product in certain designated territory.

In said agreement it was provided [Fols. 85 and 86 that:

“The party of the second part (Newerf) shall make sales from said stock of casings and tubes to responsible parties at prices lower than 10—12½ trade discount and 5% additional for cash from the 1914 price list of The Miller Rubber Company of Akron, Ohio, a copy of which is hereto attached, marked Exhibit A and made a part hereof, and dated as effective December 1st, 1913, subject to changes in said list and discounts as hereinafter set forth (and sales of other products at such prices as may be agreed upon from time to time) and make collections from all sales, and deposit the funds from said sales in such depository in Los Angeles and San Francisco as the party of the first part (The Miller Rubber Company of California) may select, *such funds to be deposited in the name of and to the credit of The Miller Rubber Company of California, subject to the check of the treasurer or duly authorized officer of The Miller Rubber Company of California*, and said second party shall make a statement of said bank account to the party of the first part on the first day of each and every month, commencing August 1st, 1914.

“All sales from consigned stock shall be made *in the name* of The Miller Rubber Company of California, and shall be on *terms* of not to exceed thirty (30) days net except in such cases as may otherwise be



mutually agreed upon in writing by said parties and except as hereinafter provided.

“Party of the second part (Newerf) shall receive in full payment *for his services* as such agent and in full payment of all salaries, rent, hire, and other expenses incurred by him, the difference between the price or prices at which goods are actually sold by said party of the second part and the price of 10-12½-12½-5% from The Miller Rubber Company’s 1914 price list effective December 1st, 1913.”

From the above it will be noted that, under the 1914 contract, Newerf ceased to be anything more than a *hired employee* of The Miller Rubber Company of California.

[Folio 38]: “A price list was furnished by The Miller Rubber Company to W. D. Newerf and by The Miller Rubber Company of California to W. D. Newerf, agent, under the contract of June 11, 1914, which states, after giving the prices at which tires are to be sold, ‘Terms 5% cash ten days.’”

Therefore, it will be noted that not only was W. D. Newerf the *hired employee* of The Miller Rubber Company of California, but he was *directed* by his employer (The Miller Rubber Company of California) to allow customers a *cash discount of five per cent.*

Newerf’s compensation under said contract was the difference between the amount for which the goods were actually sold and 10-12½-12½-5% from the list price. That is to say: If goods were listed at \$100.00, Newerf was charged with the difference between said \$100.00, and said \$100.00 less 10-12½-12½-5%, which amounted, approximately to 65%.

In other words, if goods were listed at \$100.00 and were sold at \$100.00, Newerf received as his compensation approximately \$35.00.

After the parties had been operating for some little time, The Miller Rubber Company raised a question as to this five per cent discount, which is referred to in the contract heretofore quoted [Fol. 38]; they claiming that where goods were sold for \$100.00, the provision in the invoice placed there *at the direction of The Miller Rubber Company of California*, to the effect that customers might have five per cent cash discount; if the customer should pay his bill within the limit stipulated, and receive the five per cent discount; the price at which the goods were *actually sold* was \$95.00, and that Newerf's compensation, instead of being \$35.00, should be \$30.00. Between the time when this contract of June 11, 1914, went into operation and the time of the filing of the petition in bankruptcy herein, this difference of five per cent had amounted to \$4495.25, and this money was in the hands of The Miller Rubber Company of California; because from the time the contract of June, 1914, was entered into, all money from tire and accessory sales was appropriated by The Miller Rubber Company of California.

Finding 11 of the special master [Fols. 74, 75 and 76 of the transcript] deals with this point. The special master found that the *invoice price* to the customers was the *actual selling price*, and that Newerf was entitled to his compensation on that basis, without any deduction on account of the customers' hav-

ing paid for their goods in cash. The District Court reversed this ruling; and it is from this judgment and order of the District Court that the trustee prosecutes this appeal. [Fols. 9, 10 and 11 of the Transcript on Appeal of the Citizens Trust and Savings Bank, pages 170, 171 and 172 of the Transcript.]

Newerf testified [Fol. 24, page 29]:

“My interpretation of the contract with The Miller Rubber Company of California was to the effect that the computation of the compensation was to be at the time of the contract being made, 10-12½-12½-5% from the list attached to the contract, and that the difference between the sale price of a tire or tube and those figures was to be our compensation, and our conclusion of the sale price was the *face of the invoice*. If a tire sold at \$20.00, it is 10-12½-12½-5% from the list price or from the price list attached to the contract. Our compensation should be the difference between the original price stipulated in the contract and the face of the invoice. The five per cent appearing on the invoice as terms was a matter, we concluded, of *The Miller Rubber Company's* making, and that that was simply *an inducement for the customer to pay cash* on that invoice at a stipulated time and should not enter into our compensation.

“The forms of invoices were furnished by *The Miller Rubber Company of California*.

“There was no reference to the five per cent except in the place on the invoice where it said ‘terms.’ It said five per cent 10th prox. We considered that that was allowed by The Miller Rubber Company of California.

“There was a period of time that there was no objections made by The Miller Rubber Company to our

method of figuring and I was then figuring, as I have indicated, on a sale for \$100.00." [Folio 25.]

Charles R. Wetsel, witness and credit manager for The Miller Rubber Company of California, testified [Fol. 32, p. 36]:

"The main purpose of giving the five per cent is to aid in the collection of accounts, to get the money in quicker, that is the only reason that the five per cent is given, to get collections in."

This is a case of first impression. There are no decisions dealing with the subject; and, as has been seen, the two learned judges to whom this matter has been submitted have taken opposite views of it. Yet it seems that there should be no difficulty in arriving at a correct conclusion on this point.

Newerf was furnished with a price list at which he was directed to sell. He had nothing to do with the making of prices; he had nothing to do with the allowance or refusal of this item of five per cent; *that was provided for and inserted in the price lists, and on the invoices by The Miller Rubber Company of California*, as an inducement to customers to pay cash.

These accounts did not belong to W. D. Newerf; the money did not belong to W. D. Newerf; he simply turned in a report of his sales and was to receive his compensation on his report.

If Newerf sold a bill of goods at \$100.00, how can it be said that the actual selling price of those goods was less than the amount marked on the invoice; because, forsooth, the customer chose to take advantage of the opportunity given him, *not by Newerf* but by



*The Miller Rubber Company of California*, his employer, to save himself \$5.00 by making prompt payment of his bill. And how can it be said that the selling price which, at one time, to-wit, at the time the goods were sold, was \$100.00, should be changed after the sale, and at any time before the 10th of the next month to \$95.00, at the caprice, not of *Newerf*, nor of *The Miller Rubber Company of California*, but of the customer? It seems to us that this is an absurd conclusion and that the attitude of *The Miller Company of California*, evidenced by the testimony of Chas. R. Wetsel [Fols. 31 and 32] is too absurd to warrant serious consideration by the court; and was simply an effort on the part of *The Miller Rubber Company of California* to take advantage of the situation in which it found *Newerf*, for the furtherance of its own ends, and those of the parent company, the *Miller Rubber Company*.

On pages 66 and 67 of the brief of *The Miller Rubber Company* and *The Miller Rubber Company of California*, on file herein, will be found the argument on the appeal with regard to these commissions; in which they attempt to show that there was a subsequent agreement between *The Miller Rubber Company of California* and *Newerf*, by which *Newerf* agreed to the way of thinking of *The Miller Rubber Company of California*. This is not the case.

*The Miller Rubber Company of California* wrote to *Newerf* under the name of *The Miller Rubber Company of California* at Los Angeles [Fol. 54], complaining of *Newerf's* way of figuring these com-

missions; and Newerf relied [Fol. 55], setting forth his views, which are in accord with the views taken by the trustee and by the special master.

There was no agreement with regard to these commissions; The Miller Rubber Company had Newerf's money, and Newerf had no way of enforcing payment of his commissions except by a cancellation of the contract; and, inasmuch as he was indebted over forty thousand dollars to the kindred company, The Miller Rubber Company, the parent company, he was in the position of a man who has a pistol at his head and a hand in his pocket. Fortunately, the trustee occupies a different position.

It is contended by The Miller Rubber Company and The Miller Rubber Company of California that the commissions of W. D. Newerf were applied to the indebtedness of said Newerf to The Miller Rubber Company of Ohio, under authorization from Newerf; and that therefore no judgment will lie for the balance of these commissions, against The Miller Rubber Company of California. This contention is based on the day letter of W. D. Newerf to The Miller Rubber Company, Akron, Ohio, dated November 12, 1914 [page 32, folio 27], which telegram reads as follows:

"New notes mailed per your request. Agreeable to apply our commissions on open account. Return us the notes for which we have sent renewal. Writing."

This telegram was part of the correspondence between Newerf and The Miller Rubber Company relative to the application of these commissions, and it will

be seen from the transcript that separate authorizations were obtained for each application of these commissions.

In a letter of The Miller Rubber Company, found on page 54 of the transcript, it is stated:

“August check for commissions as \$3173.02 and with July commissions will be applied by us on notes 15th.”

No authority for any application of commissions was given subsequent to November, 1914, and as the telegram shows, it applies to commissions previously earned and a settlement made at that time; and does not in any way refer to commissions to be earned in the future. Under the circumstances The Miller Rubber Company of Ohio had no right to apply any commissions earned after the first of November, 1914, to the payment of its account. Furthermore, this amount of \$4495.25 is an amount which never was applied, because it is claimed by The Miller Rubber Company of California *not to be owing* to Newerf; and said amount is now owing from The Miller Rubber Company of California to the trustee of this estate.

It is respectfully submitted that the decision of the Hon. Robert S. Bean [Folio 115], wherein he refused to allow Newerf the amount deducted by The Miller Rubber Company of California, to-wit, the sum of four thousand four hundred and ninety-five and 25/100 dollars (\$4495.25), should be reversed and judgment entered in favor of the trustee and against The Miller Rubber Company of California for said

sum of four thousand four hundred and ninety-five and 25/100 dollars (\$4495.25).

**Reply Brief of the Appellee, Citizens Trust and Savings Bank, Trustee in Bankruptcy of the Estate of W. D. Newerf, Bankrupt.**

This appeal is prosecuted by the appellants from a decision of the Hon. Robert S. Bean, judge of the District Court sitting in Los Angeles, confirming the report of the Hon. Lynn Helm, special master, with regard to the title to certain automobile tires and accessories which were delivered to W. D. Newerf, bankrupt, by The Miller Rubber Company of Akron, Ohio, under and by virtue of a certain contract dated November 6, 1911, between The Miller Rubber Company and the Prudential Rubber Company, both of Akron, Ohio, both corporations existing under the laws of the state of Ohio, and W. D. Newerf Rubber Company of Los Angeles; which goods were found in the possession of said bankrupt when the receiver took charge; and which goods, according to the report of the special master, are of the invoice value of seven thousand six hundred and eighty-five and 23/100 dollars (\$7685.23). This contract appears in folios 80 to 83, inclusive, and an examination of this contract will be interesting and instructive. The principal points in this contract are as follows:

1. The Miller Rubber Company agreed to furnish Newerf a stock of goods on consignment;
2. The goods were to remain the property of the consignor until sold;
3. Newerf had the option of giving four-months



notes up to twenty-five thousand dollars (\$25,000.00) to cover his indebtedness;

4. There is no stipulation to the effect that the consignor shall dictate the price at which goods shall be sold;

5. There is no agreement that the goods shall be kept segregated from the other goods in Newerf's stock;

6. There is no agreement to the effect that the accounts and bills receivable resulting from the sales on credit shall belong to the consignor.

As a matter of fact, the testimony shows [Folio 23, p. 28] that Newerf had full charge of the selling of the Miller goods in his store; that there was no representative of The Miller Rubber Company in his establishment; that he did not consult The Miller Rubber Company with regard to what credit he should extend nor with regard to what goods he should sub-consign; that he had no sign in his store to indicate to the general public that anything was the property of The Miller Rubber Company; that the consigned merchandise was mingled with other goods in his store.

This is also confirmed in the testimony of John F. Roe [Folios 28 and 29]:

"A stranger coming to the room or coming into the store could not distinguish part of the stock from the other except that part was tires and accessories and the other part was the shipping room.

"No stranger coming in would notice any difference. There was nothing to indicate that the goods belonged to anybody except the W. D. Newerf Rubber Company."

Also, the testimony of Charles R. Wetsel, credit manager of The Miller Rubber Company [Folio 32, p. 36]:

“It is optional with the agent as to what he sells goods for. He does not even have to use our list. *He could charge twice the prices if he wanted to.*”

In other words, under the 1911 contract, (1) Newerf mingled the consignor's goods with his own so that they could not be distinguished therefrom; (2) sold them at his own prices and upon his own terms; (3) the money and accounts and bills receivable resulting from the sales belonged to him and *did not belong to the consignor*, but were covered by notes, which the contract shows were to amount to as much as twenty-five thousand dollars (\$25,000.00).

These elements, we contend, stamp the 1911 contract as a fraud upon the creditors; and it is urged that this court should affirm the judgment of the District Court, which confirmed the report of the special master holding that the goods delivered under the 1911 contract and found in the stock at the time of the bankruptcy, belonged to the estate and not to The Miller Rubber Company.

This is a question of vast importance to the commercial interests of this country; because, if a manufacturer or a wholesaler can ship his goods to a retailer, to be used during prosperous times to all intents and purposes as if they were the retailer's own goods; and then, when adversity overtakes the retailer, can reclaim his goods, there is no protection for the other creditors.

That ample protection can be afforded the wholesaler or manufacturer is very clearly demonstrated by the action of the parties in the agreement of June 11, 1914, under which contract The Miller Rubber Company of California (1) employed Mr. Newerf [Folio 84]; (2) controlled the selling price [Folio 86]; (3) controlled the proceeds [Folio 86]; (4) controlled the terms [Folio 86]; (5) required that all sales should be made in the name of The Miller Rubber Company of California [Folio 86].

The special master and the District Court very properly held that the balance of the goods on hand shipped under the 1914 contract (which amounted to over fifty thousand dollars) should be by the receiver delivered to The Miller Rubber Company of California. [Folio 71, p. 79.]

It will therefore be seen that this case presents to the court an excellent opportunity for finally settling the law with regard to these two classes of contracts; and laying down a plain rule for business men to follow; so they can amply protect themselves if they so desire in the title of their goods, and still give protection to other creditors furnishing goods to the same debtors.

There are two distinct lines of cases cited by the courts of this country on this point; and while there has been more or less confusion, on account of the varied nature of the different transactions, it will be found that almost invariably where the elements exist which are to be found in the 1911 contract, the title to the goods on hand has been held to belong to the

bankrupt estate. And that where the elements of the 1914 contract predominate, the courts have held that the goods should be turned over to the consignor.

The cases in bankruptcy state that, where possible, the laws of the state in which the controversy arises, should be looked to for a rule to govern the decisions of the bankrupt courts. Under the laws of the state of California, conditional sale contracts are valid; but the cases in which they have been held to be valid, have been cases in which the property to be consigned was not for sale or consumption by the vendee:

155 Cal. 459, automobile;

36 Cal. 151, four mules, harness and one wagon;

41 Cal. 455, piano;

53 Cal. 597, furniture;

100 Cal. 408, horses;

123 Cal. 474, printing press;

30 Cal. 407, steam boiler, etc.;

30 Cal. 407, steam boiler, etc.;

163 Cal. 256, automobile;

158 Cal. 302, automobile;

72 Cal. 293, Palmer v. Howard.

In the last cited case, the Supreme Court of the state of California stated as follows:

“It is settled in this state that even *bona fide* purchasers from the person to whom personal property is delivered under an executory contract of sale, get no valid claims to the property. (Kohler v. Hayes, 41 Cal. 455; Hegler v. Eddy, 53 Cal. 598.) But in applying this rule, it must be re-



membered in general that *the policy of the law is against upholding secret liens and charges to the injury of innocent persons or encumbrancers for value*, and, in particular, that mortgages of personal property are permitted only in certain specified cases and then only upon the observance of certain formalities designed to insure good faith and to give notice to the world of the character of the transaction. These provisions as to mortgages cannot be evaded by any mere shuffling of words where it is clear from the whole transaction that for all practical purposes, the ownership of the property was intended to be transferred and that the seller only intended to reserve a security for the price. Any characterization of the transaction by the parties or any mere denial of its legal effect will not be regarded. The question, it is true, is one of intention but the intention must be collected from the whole transaction and not from any particular feature of it."

Turning now to the cases which appellant has cited in support of its contention, we desire to take these cases up in order and show their distinguishing features.

1. Met. Natl. Bank v. Benedict, 74 Fed. 182, decided in 1896:

"The S. Company made a written contract with the B. Company whereby it agreed to realize for consignment all ready-made clothing of B. Company, net prices as per memorandum, etc. Shortly afterwards the S. Company made a bill of sale of all its stock to the M. Bank, expressly excepting from the operation of such bill of sale goods held

by the S. Company on consignment for others. At the time of the making of such bill of sale, the S. Company notified the bank that the goods received from the B. Company were held on consignment and separated such goods from others in its warehouse, but the bank took said goods and converted them to its use; whereupon, the B. Company sued for their value. Held: That the contract between the S. Company and the B. Company was not a sale but a contract of factorage which passed no title to the S. Company which could be transferred by bill of sale."

Thus it will be noted that there was no question here of the rights of creditors or of the trustee in bankruptcy. The bank simply stood in the shoes of the S. Company. This case throws absolutely no light on the controversy.

2. *In re Columbus Buggy Co.*, 142 Fed. 859, decided in 1906. In this case the Circuit Court of Appeal for the Eighth circuit held that the trustee stood in the shoes of the bankrupt: this was prior to the 1910 amendment.

3. *Dunlop v. Mercer*, 156 Fed. 545, decided in 1907. The fourth syllabus states as follows:

"The failure to record a contract of conditional sale renders it voidable by attachment creditors, judgment creditors and *bona fide* purchasers only in Minnesota and where there were no such creditors and purchasers when the petition in bankruptcy was filed, such failure did not render it voidable by the trustee because he had no better

title in the absence of fraud than the vendee and his creditors had at the filing of the petition.”

This case was decided prior to the 1910 amendment and shows on its face that it was decided on the theory that the trustee stood in the shoes of the bankrupt.

4. *In re* Pierce, 157 Fed. 757, decided by the Eighth Circuit Court of Appeals in 1907.

In this case it is held that the trustee had no greater right than the bankrupt.

5. *Franklin v. Stoughton Wagon Co.*, 168 Fed. 857, decided by the Eighth Circuit Court of Appeals in 1909.

This case holds that the trustee had no greater right than the bankrupt. It also shows the following facts:

The property was insured in the name of the consignor; sales were to be settled for in cash or customer's notes, the notes to be made on blanks furnished by the consignor and the notes to be delivered to the consignor. The consignee had no ownership in the proceeds. The contract states: "All proceeds of the sales shall remain vested in the consignor." The court said:

"The contract before us is not a contract in which the consignee can sell at any price or on any terms he chooses."

6. *In re* Gray, 170 Fed. 638, District Court of Oklahoma, 1908. In this case there was no question of the rights of creditors holding a lien by legal or equitable process because it was decided before the

amendment of 1910, and the only question before the court was that of recordation under the Oklahoma law.

7. *In re Bailey*, 176 Fed. 628, District Court of South ~~California~~ <sup>Carolina</sup>, decided February 4, 1910, before the 1910 amendment. The court said:

“The referee found as a matter of fact that the paints and painters’ supplies were furnished under a contract of consignment; that same was not recorded and that the claims represented by the creditors who have filed this petition for review *have not been reduced to liens.*”

It was held that:

“Petitioners could reclaim their goods under the statute of South ~~California~~ <sup>Carolina</sup> which provides, ‘every agreement between the vendor and vendee, bailor and bailee, of personal property whereby the vendor or bailor shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors or purchasers for a valuable consideration without notice unless the same is reduced to writing and recorded in the manner required by law for recording agreements.’

“The trustee takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it subject to all equities impressed upon it in the hands of the bankrupt.”

8. *In re Smith*, 192 Fed. 574, District Court of Maryland, 1911. The contract in this case provides:

“The fertilizers and all proceeds of any sale of the same made by such agent are to be the prop-



erty of the said Baltimore Pulverizing Company and to be held by said agent in trust for said Baltimore Pulverizing Company until the said proceeds of sale shall have been paid over to the said company and until any and all notes given for the sale of said fertilizer, either by the said agent or said purchasers, shall have been paid and satisfied.

“All bills to purchasers were marked ‘Mr. James H. Smith, Agent of Baltimore Pulverizing Co., in account with said company.’”

“In this case the contract and shipments were proven and nothing else. No course of dealing was proven between the parties more consistent with their considering themselves buyer and seller than agent and principal. Bankruptcy followed hard after the making of the contract. When the petition was filed no remittance had ever been made by the bankrupt; none had become due. In this state of the proof, the company is entitled to the proceeds of its fertilizer in the hands of the trustee, unless, as a matter of law, such contract, as it made with the bankrupt, must always as against an execution creditor of the so-called agent, be held to be a sale; *such contracts may readily be abused.*”

The court held that the character of the transaction will depend upon what the parties did and not what name they gave to what they did.

9. *In re Farmers Co-operative Co.*, 202 Fed. 1005, District Court of North Dakota.

This was under a statute of the state of North Da-

kota relative to the recordation of contracts and no question of the resale of the property was involved.

10. *Wood M. & R. v. Vanstory*, 171 Fed. 375, Circuit Court of Appeal, Fourth circuit, 1909.

The points in this case are these: The machines were not charged to the bankrupt nor invoiced as part of its stock. The property was capable of easy identification, that is to say, it was not mingled with the other goods of the bankrupt. The consignor paid storage to consignee. The court held that the contract was primarily one of storage. The consignee could purchase from the storage stock. In this case it was held that the trustee had only the rights of the bankrupt. This case refers to *Wood v. Eubank*, 169 Fed. 929, where it is held

“A bankrupt’s trustee occupies the same relation to the creditor that the bankrupt sustained prior to the date of the adjudication.”

11. *Foreman v. Drake*, 98 N. C. 311. In this case there was no agreement to resell. It was simply a lease contract for sale of household goods.

12. *L. C. Smith Co. v. Alleman*, 199 Fed. 1. In this case there was no provision for a resale. It was simply an ordinary lease contract for the sale of a typewriter.

13. *In re Reynolds*, 203 Fed. 162, District Court, Eastern district of Kentucky, 1912. In this case the goods were insured by the consignor at its expense. The entire proceeds of the sale were the sole property

of the consignor and it was agreed that they should be kept separate by the agent and apart from his other funds.

14. *Berry Bros. v. Snowden*, 209 Fed. 336, Ninth circuit. In this case the consignor paid the freight, cartage and insurance. The consignor had the right to withdraw goods from storage at will. This case holds that it is different in its facts from the case of *Penny v. Anderson*, 176 Fed. 141.

15. *In re Killian Mfg. Co.*, 209 Fed. 498. In this case the goods or the proceeds were held in trust for the consignor until the price was paid.

16. *In re Grand Union Co.*, 219 Fed. 353. This case has nothing to do with the consignment of goods for resale but is a case involving the question as to whether the petitioner had bought certain piano leases or simply loaned money on them as security.

17. *General Electric Co. v. Brower*, 221 Fed. 597, decided by the Ninth Circuit Court of Appeal. In this case the proceeds were held for the benefit of the consignor. The consignor could compel the return of the goods at any time. The agent was compelled to sell at prices and on terms fixed by the consignor. On all bills and invoices for lamps sold by the agent, the following words appeared:

“Agent for Banner Incandescent Lamps of General Electric Co.”

The agent's books and records were always open to the consignor. The boxes containing the lamps were marked "Banner Electric Co."

18. *In re* National Home & Hotel Supply Co., 226 Fed. 840, District Court of Michigan. In this case it is held that no test can be applied and that each case must be separately construed. At the same time under the facts in this case, we are of the opinion that the learned District Court erred in awarding the goods to the consignor and that the decision should have been with the trustee in bankruptcy.

19. *Ludvigh v. American Woolen Co.*, 231 U. S. 522. In this case the title was to pass direct from consignor to purchaser. Consignor had his sign on the door. Consignee agreed to collect for the consignor. The consignor had a bookkeeper in consignee's store. Consignee was not permitted to keep the proceeds of the sale or use them for its own use.

It will thus be seen that there is not a single case cited by appellant, with the exception of the case of the National Home & Hotel Supply Company (which, by the way, is a District Court case and is not governing in this court), which cannot readily be distinguished from the case at bar.

In all these cases, except those which are decided under the old law and holding that the trustee stands in the shoes of the bankrupt, certain distinguishing features appear, that is to say:

(1) There is a segregation of the consigned goods from the other goods of the consignee;



(2) The goods are sold in the name of the consignor;

(3) The consignee obtains no title to the proceeds, but holds them in trust for the consignor;

(4) The sales prices are dictated by the consignor.

These were the distinguishing features of the case of the General Electric Company v. Brower, *supra*, decided by this court about a year ago.

### **Cases for Appellee.**

Turning now to the cases upon which appellee relies to support its contention, we first find the case of *In re Gracewich*, 115 Fed. 87, 8 A. B. R. 149, decided by the United States Circuit Court of Appeals, Second circuit, April 22, 1902, in which case it was held:

“Where goods were sold to the bankrupt upon credit and upon the understanding that the title to such of them as should not be sold by him should remain in the vendor until payment of the purchase price, the transaction cannot be upheld as a conditional sale and is a fraud upon the creditors of the vendee. The title to the goods vested absolutely in the buyer and passes to his trustee in bankruptcy under section 70-a, the nature of which is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another.”

This was a petition for a review of an order of the District Court as a court of bankruptcy, directing the trustee to return to the United Shirt & Collar Company certain goods, wares and merchandise claimed by

the company to belong to it and claimed by the trustee to be part of the bankrupt's estate. The case arose in New York. The court said:

"It is settled law of this state that personal property may be sold and delivered under an agreement for the payment of the price at a future day and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent and until the performance, the title does not vest in the buyer. \* \* \* But when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable and the title to have vested absolutely in the buyer."

*In re Miller & Brown*, 135 Fed. 868, 14 A. B. R. 439, U. S. District Court, Eastern District of Pa., March, 1905:

Mr. Brown, of the bankrupt firm, desiring to obtain an assortment of carpets and rugs or art squares, called at the mill of the Magee Carpet Co., the petitioner, and selected certain carpets, and had same shipped upon the understanding that what the firm sold should be paid for and what they did not, should be returned. Claim was made against the trustee in bankruptcy for the unsold portion. The court held:

"Where the transaction between the bankrupt and another in regard to certain carpets and rugs constitute nothing more than what is known in

law as a contract of sale and return, the title to the unsold portion of the goods so consigned on hand at the date of adjudication, passes to the trustee in bankruptcy."

*In re Wells*, 140 Fed. 752 (15 A. B. R. 419), District Court Middle District of Pa., November, 1905. In this case the court said:

"There is no particular magic in the terms 'consign' or 'consigned account.' The question is, What was the inherent character of the transaction which depends upon the purpose of it? Were the goods put into the hands of one party by the other to be sold for him and on his account, creating the relation of principal and factor, or were they turned over to such party to be treated and disposed of as his own, being responsible to the other simply for the price? In the one case we have a trust or bailment, the goods being those of the consignor or principal, as well as all moneys received for them. In the other there is a sale, the superadded condition sometimes appearing, that the title shall not pass until the goods are paid for, amounting to nothing as a restriction upon it."

The court quotes 24 Am. & Eng. Ency. of Law, 2nd Ed., 1026, where it is said:

"In case of goods consigned to be sold for the consignor, who is to regulate the price and terms of sale, the factor is the agent and the contract one of bailment, and this is so though the consignment is made on a *del credere* commission. If, however, the consignee or factor is to sell upon terms fixed by himself and is bound to pay

to the consignor a fixed price, the contract is one of sale.”

In this case it was agreed that goods should be consigned instead of being sold in the regular way. It was provided that the consignee should take an inventory of those goods which she had on hand that should be charged to her consignment account. She was to report monthly the amount she had on hand, and the sales which she had made, paying for the latter the regular wholesale prices at which the goods were billed to her. It was urged by the consignor that the money received from the sales should be kept separate, but this was not done. It was stipulated that the goods should remain the property of the consignor and that it should be at liberty at any time to come and take them. The court said:

“Were the goods sent to Mrs. Wells by the Silk Company to be sold on their account, she merely acting as their factor or agent in disposing of them; or in making sales, did she act for and on her own account, realizing what she could and being answerable to them only for the wholesale price? It seems to me that there can be but one answer to this inquiry. \* \* \* As to all the goods covered by the so-called consignment account on hand at the time or subsequently sent her, it is clear that they were dealt in and disposed of by Mrs. Wells as her own. Upon their receipt, they were mingled with her other stock and not kept separate as would be expected in the case of commission goods, although it is possible that they could have been identified by the tags upon them



if it became necessary, as could, however, other things in the store, with little doubt. But more than this, they would be invoiced and charged to her by the Silk Company at definite prices and *sold by her on her own account at such figures and to such parties as she saw fit*, over which the Silk Company had no control, except as they might have taken away the handling of their goods if she cut their memorandum retail price. \* \* \* But *the money received was not to be kept separate* and the only purpose of the provision that *she should make monthly reports* was apparently in order to keep track of her sales and thereby fix the amount for which she was to account. Nor does it add any particular strength to the case that the goods were to remain the property of the Silk Company until paid for. This was an unnecessary stipulation if the transaction was in reality a bailment, and raises the suspicion that in resorting to it the claimants had their doubts. At most, it was an attempted condition by which the better to secure the price enforceable no doubt between the parties even to the extent of retaking the goods, but worthless as to creditors and so of no avail here."

Penny & Anderson, 23 A. B. R. 115, 176 Fed. 141, U. S. District Court, Southern District of New York.

Penny and Anderson became bankrupt and a receiver was appointed. The receiver made an inventory of the stock on the premises, which included a quantity of wines and liquors found in the cellar and known as the property of McCunn & Co. These goods were not in any way separated from the other wines

and liquors stored in the wine cellar, but were used as required in the restaurant upstairs. McCunn & Company filed a petition, claiming title to certain wines and liquors in the receiver's possession and produced an agreement by which McCunn & Company agreed to stock the wine cellar of Penny & Anderson with certain wines and liquors on consignment, the title to said wines and liquors to remain in McCunn & Company until the full indebtedness of Penny & Anderson to McCunn Company had been paid in full. No payments were ever made on these goods and the petitioner asked that they be returned as consigned or for their full value. The referee recommended to the court that the petition be dismissed for the reason that the inherent character of the attempted consignment was a sale of goods for consumption with the *secret restriction* that title should not pass until the goods were paid for, which is inconsistent with the continued ownership of the vendor and fraudulent and void as against creditors of the bankrupt. The court said:

“The debtors were permitted to sell and dispose of the goods as they saw fit at any price and terms for consumption on the terms as required in their business. The agreement is silent as to the disposition of the proceeds of the sale but recognizes an indebtedness on the part of Penny & Anderson to be paid before the title vest in them. \* \* \* *The vice in the whole transaction lies in the fact that the goods were delivered for consumption or sale in a way inconsistent with continued ownership of the vendor and therefore constituted a fraud upon the vendee's creditors.*”

*In re* Harrington, 32 A. B. R. 828, 212 Fed. 542. This is a case practically on all-fours with the case at bar. The petitioner, Flanders Motor Company, of Detroit, Michigan, granted to the bankrupts the sale of Everitt automobiles in all the New England states except Connecticut, and agreed to sell said automobiles to dealers at certain specified discounts from the catalogue prices. The fifth clause of the contract provides that "the dealer shall on orders for parts be allowed 30% discount from the last list price established by the manufacturer." The ninth clause provides that "It is expressly understood and agreed that the title to each and every automobile and to all automobile parts furnished to said dealer under the terms of this agreement shall not pass to the dealer until the same is fully paid for in full and cash."

The court said on page 544:

"The rights of the parties depend upon the real and complete agreement between the claimant's purchaser and the bankrupts. The court is not limited to the mere language of the written instrument; it may examine all facts concerning the matter and determine whether the written contract was made in good faith or was merely colorable and if made in good faith, and whether its provisions for the retention of title were waived by the vendor.

"It is apparent that neither the claimant nor the dealer understood or believed, either at the time when the written contract was made or subsequently, that its terms were to be lived up to, and those stringent provisions in regard to the retention of title were inserted not for the pur-

pose of every day business, but *only in an effort to safeguard the rights of the vendor in case the dealer should fail*. The parties plainly contemplated that the parts in question were to be taken and kept by the bankrupts in order that they might be promptly accessible for repairs upon Everitt automobiles in the dealer's territory, and that as such parts should be needed for repairs, the bankrupt should sell and deliver them to the persons upon whose automobiles the parts were used.

"It is absurd to suppose that the claimant can now replevy from the various persons whose Everitt cars were repaired by the bankrupts, the parts used in such repairs, although by the literal terms of the contract of June 28, 1911, the claimant would have that right. *Both parties to the contract understand that it did not mean what it said* and that the dealer did have the right to sell and dispose of parts in the ordinary course of business. It is to be observed that *the vendor made no reservation of its right to the proceeds of such sales; no provision as to the insurance upon the parts; no prohibition against mingling the parts with other goods or proceeds of the sales with other money of the dealer*. The actual agreement between the claimant and the bankrupt is to be gathered not from a single clause of the written contract but from the complete understanding between the parties. The formal reservation of title in the written instrument is contradicted and nullified by the unwritten parts of the agreement and the written contract is *pro tanto* merely colorable. \* \* \*

"The case is, of course, to be determined according to the law of Massachusetts under which



special interests in personal property are strongly protected. At the same time it seems to me that 'the real purposes and understanding of the parties to the contract were to make an effectual sale, and that the writing, if not interpreted to withhold the title by its terms, was merely a convenient resort to provide the right to take the goods in event of disaster overtaking the concern.' Day, J., in *Ludvigh v. American Woolen Co.*, 231 U. S. 522."

*In re Flanders v. Reed*, Circuit Court of Appeals, First Circuit, Feb., 1915, 33 A. B. R. 842, 220 Fed. 642, confirming *In re Hartington*, 32 A. B. R. 828. The A. B. R. syllabus reads as follows:

"A vendor of automobile parts in the possession of a bankrupt at the time of his bankruptcy cannot reclaim them under the contract providing that the title shall remain in the vendor until payment in full, but containing no provisions preventing the bankrupt from treating the parts as his own and selling them in the ordinary course of business and applying the proceeds to his own use, which he did, with the knowledge and without the objection of the vendor. Such a contract is fraudulent as to creditors."

*John Deere Plow Co. v. Leon D. Mowry*, trustee, U. S. Circuit Court of Appeals, Sixth Circuit, May 1915, 32 A. B. R. 384, 222 Fed., page 1.

"The whole controversy turns upon whether the contract between the Dere Company, manufacturer, and Miller Brothers, retail dealers, was one of conditional sale, so that the title did not pass out of the manufacturer so long as the goods re-

mained unsold by Miller Brothers, or was one of absolute sale, whereby the title did pass, accompanied by a pledge or lien given back to the seller to secure the purchase price. If the former, the contract was not by any applicable statute required or permitted to be recorded, and the reservation of title is good as against the trustee. If the latter, the contract amounts to a chattel mortgage, and under the June, 1910, amendment of section 47a of the Bankrupt Act, it is invalid as against the trustee because not filed. \* \* \* In one class may be put articles like machinery, somewhat permanently installed, intended for use by the vendee and not intended for resale by him. These cases present no inherent difficulty in sustaining the vendor's reserved title as fully as the seemingly very liberal policy of the state (Michigan) in this respect may justify. There is in the contract or in the surrounding conditions nothing inconsistent with the expressed reservation of title, and so nothing to interfere with its naturally full effect. In the other class are the cases where it is clear either by expressed words or by necessary implication that both parties intended the vendee should resell the property to others and should give to such second purchaser a perfect title. Here at once we have an inconsistency. How can the vendee sell that which he does not own? It goes without saying that if there are in the contract inconsistent provisions, some of which indicate that the title was served and some that the title vested, the dominant thought must be ascertained and given effect regardless of any formal contrary statement. By a review of the Michigan cases and the principles which must control, we

are led to the conclusion that the reservation of title can be sustained (as a conditional sale) as against a declared right of resale only on the theory that the resale is made by the vendee as the agent or consignee of the vendor by an agency or consignment which underlies the executory sale and which is a continuing one until it is terminated either by the resale or the vendee's personal performance of the condition which then for the first time vests title in him. \* \* \* Our general view \* \* \* is to the effect that where goods are intended for resale, the reservation of title cannot stand (as a conditional sale) unless taking the entire contract and circumstances together it is clearly dominant over the right of resale and the other inconsistent features of the contract. In other words, the facts as a whole must be consistent with the theory that the resale is made by the vendee as agent or consignee and not as owner, \* \* \* or where intent of the parties is to be drawn from the value of the contract and from the joint effect of all the conditions."

In this case it was held that the title passed to the vendee accompanied by a pledge of lien to the vendor to secure the purchase price, constituting a chattel mortgage invalid as against the trustee of the vendee because not filed for record.

*In re Agnew*, 23 A. B. R. 360, 178 Fed. 478. In this case District Judge Niles said:

"It is the rule in bankruptcy as to goods shipped upon consignment, that where there is a clear and unequivocal contract of consignment between the seller and the purchaser the goods will be returned

to the seller upon institution of reclamation proceedings, but all the essential elements of a contract of agency must unite before the goods can be successfully reclaimed by the seller. *All goods must be at all times subject to the control and direction of the seller; he must control the selling price of the goods and the manner in which such goods shall be sold; nothing is left to the purchaser as to the price he is to obtain upon a resale. There must be a strict accounting between the seller and purchaser at the periods called for in the contract of agency, such accounting to give the names of the purchasers, the amount obtained for the goods, the number of vehicles sold, information as to whether the sale was a cash one or for a promissory note. If there be promissory notes or accounts in payment of the goods, such notes and accounts must be either forwarded to the seller or accounted for by the purchaser and held by him subject to the orders of the seller, to be forwarded to him upon demand.*

“All of these elements must unite to make such a contract of consignment as that the goods will be returned to the seller in reclamation proceedings. \* \* \* The other rule is that goods sold with a *jus disponendi* by vendee are lost to the vendor, and especially so as to creditors of the latter.

“The two classes of decisions pursue two different paths because of this crucial question.

“The test is whether or not goods are held for resale in the usual course of business. \* \* \* A careful reading of the above cases will show that in each and every one the property, the title to which was retained until paid for, was sold to the purchaser not for the purpose of resale by



such purchaser but to be used by such purchaser in his business, be it that of a sawmill, a dispenser of soda water, the business of a livery stable (hiring out teams and doing draying business and feeding animals for pay) or what not, but not for resale in the usual course of trade.

“In those cases above referred to wherein the sawmill machinery was sold and was the subject of litigation, it will be seen that the property was to be used and was used in the operation of a sawmill business and not to be resold by the purchaser thereof. In those where horses and mules were sold, the purchaser thereof was not engaged in the business of buying and selling mules but in each and every case he purchased the animal for use and not for resale. In the soda fountain case, *supra*, the fountains were sold to the purchaser not for resale by him, but for the purpose of dispensing soda water therefrom to customers. In the Fairbanks case, *supra*, the Freeman Service Company was engaged in the plumbing business and used the gasoline engine in controversy in conducting that business. They were not engaged in the business of selling gasoline engines, but in the plumbing business, and the engine was a necessary implement to the proper conduct of their business.

“Now, having shown that in each of the above cases the purchasers of the properties were not engaged in the business of buying and selling such properties, but that they were bought for use as a fixture, so to speak, or a necessary incident to their business and not for resale, let us now take up this case where personal property was sold with title retained before the property was sold

to the purchaser for the purpose of resale by him.”

The case of *In re Mann* is an unreported case decided by District Judge Dooling in San Francisco a few months ago. The referee ruled that the goods should be returned to the consignor, but Judge Dooling overruled the referee and held that the title passed to the trustee in bankruptcy. The facts are very similar to those in *National H. & H. Supply Co.*, 226 Fed. 840, and show that Judge Dooling did not consider it as establishing a safe rule to follow.

It will thus appear that the trend of the decisions sets very strongly in the direction of denying reclamation petitions for goods consigned for resale, and that such petitions will be denied unless it appears, first, that the consigned goods are segregated and not mixed with the other goods of the consignee; second, that the consignor controls the price and terms upon which the goods are to be sold; third, that the goods are sold upon the account of the consignor and not upon the account of the consignee,—and fourth, that the title to the proceeds, whether in cash, accounts or bills receivable, remains with the consignor until payment is finally made.

Applying this test to the 1911 contract and the actions of the parties under it, it will be seen, as heretofore stated, that none of these conditions were complied with. First, the goods were not segregated; second, they were sold by Newerf, or reconsigned by him to such parties and upon such terms and at such prices as he saw fit, without any interference or con-

trol of The Miller Rubber Company; and, third, the proceeds of the sale belonged to him absolutely and did not in anywise belong to The Miller Rubber Company, but arrangements were made in the contract and actually carried out in the conduct of the business, for the giving of four-months' notes up to twenty-five thousand dollars (\$25,000.00) in payment of goods sold.

Such a state of affairs is not countenanced by the bankruptcy courts.

In view of the importance of limiting the possibilities for fraud in business transactions, it is urged that courts should lay down very plain rules regulating consignments; and should discountenance any attempt to use "consignment" or agency," as they were attempted to be used under the 1911 contract, simply as a sheltering rock in the time of financial storm.

### **Two Corporations.**

The contention is made on behalf of the appellants that The Miller Rubber Company and The Miller Rubber Company of California are one and the same corporation. This contention, to our mind, is absurd, and yet, inasmuch as the point is urged by appellants, we desire to call the court's attention to certain facts with regard to these corporations.

First: The Miller Rubber Company of Ohio is an Ohio corporation, whereas The Miller Rubber Company of California is a California corporation.

Second: The Miller Rubber Company of Ohio is a manufacturing concern, whereas The Miller Rubber Company of California is a selling concern.

Third: The officers of the two corporations are not identical.

Fourth: Appellants themselves considered, so long as it was convenient, that they were separate, and contracted with W. D. Newerf as separate corporations. This is evidenced by the two contracts of 1911 and 1914. In the report of the special master, on page 63 of the Transcript [fols. 58 and 59], the following finding appears:

"I find that The Miller Rubber Company of California is a corporation duly organized and existing under the laws of the state of California, with its principal office at San Francisco, in the state of California, and also having an office at Akron, in the state of Ohio. The Miller Rubber Company of ~~Ohio~~, last mentioned, was organized for the purpose of acting as the agent in handling and selling the goods of The Miller Rubber Company of Ohio and to enable The Miller Rubber Company of Ohio to have a representative in the state of California, thereby saving The Miller Rubber Company of Ohio from filing a certificate and paying a license tax and being licensed to do business in the state of California. It was also organized to protect the name of The Miller Rubber Company in California and to prevent, so far as possible, trade competition therewith. This is a distinct corporation from The Miller Rubber Company of Ohio, and while it does appear from the evidence that the officers of the two corporations are the same, and it is owned and controlled by the stockholders of The Miller Rubber Company of Ohio, nevertheless The Miller Rubber Company of California is a distinct entity and

*Calif*



must in all respects be treated as such in its dealings with the bankrupt.”

As a matter of fact, the officers of the two corporations are not identical. The Miller Rubber Company of California has five directors, and two of those are located in California and are not identical with the officers of The Miller Rubber Company of Ohio. [Fol. 34, p. 38.] In other words, The Miller Rubber Company of Ohio, not wishing to comply with the laws of the state of California relative to foreign corporations doing business in this state and paying the necessary fees, and to prevent another Miller Rubber Company from being organized in California, caused The Miller Rubber Company of California to be organized [fol. 33, p. 37]. If they wish to accept the benefits of having two corporations, they certainly must not complain if they are called upon to bear the burdens of two organizations.

### **Termination of Contract.**

Appellant also contends that the contract of 1911 was terminated by the contract of 1914, and quotes the following from the contract of 1914 [Tr. p. 104, fols. 90 and 91]:

“This contract and supplement shall supersede all contracts, agreements or understandings of any nature now existing between The Miller Rubber Company or The Miller Rubber Company of California and W. D. Newerf Rubber Company or W. D. Newerf, and such contracts, agreements and understandings shall be and are considered null and void except as to the unpaid accounts.”

This contract was signed by The Miller Rubber Company of California and W. D. Newerf. The Miller Rubber Company of Ohio was not a party to it; so that it has absolutely no bearing on the contract of 1911. Furthermore, even if the contract of 1911 were terminated by the contract of 1914, such termination would not alter the status of the goods shipped under the 1911 contract and on hand at the time of the filing of the petition in bankruptcy.

The status of these goods is to be determined by an interpretation of the contract under which they were shipped, and the actions of the parties to that contract, so that, so far as these goods are concerned, it is immaterial whether or not the contract was terminated,—the result is the same.

We earnestly submit that the final judgment of the District Court of the United States, in and for the Southern District of California, Southern Division, in affirming the report of the special master, denying the petition of The Miller Rubber Company, and The Miller Rubber Company of California, for the return of the goods on hand under the 1911 contract, should be affirmed.

We also urge that the commissions, amounting to \$4495.25, should be held to be owing to the Newerf estate from The Miller Rubber Company of California; and that judgment should go accordingly.

Respectfully submitted,

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DAVE F. SMITH,  
NORMAN A. BAILIE,

*Attorneys for Citizens Trust and Savings Bank, Appellee and Cross-Appellant.*



No. 2737.

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IN THE  
United States  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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The Miller Rubber Company, a  
corporation, and The Miller  
Rubber Company of California,  
a corporation,

*Appellants,*

*vs.*

Citizens Trust & Savings Bank, a  
corporation, as Trustee in Bank-  
ruptcy of the Estate of W. D.  
Newerf, doing business as W.  
D. Newerf Rubber Company,  
Bankrupt,

*Appellee.*

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**Reply Brief of Appellees The Miller Rubber Company and  
The Miller Rubber Company of California.**

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BICKSLER, SMITH & PARKE,  
*Attorneys for The Miller Rubber Co. and The Miller  
Rubber Co. of California.*

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D. Newerf Rubber Company,  
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*Appellee.*

## **Reply Brief of Appellees The Miller Rubber Company and The Miller Rubber Company of California.**

We are filing this reply brief to assist the court so far as possible to clearly determine the issues herein, by more specifically showing the points raised and decided in the cases cited herein.

1911 CONTRACT.

The trustee claims:

(a) That the giving of notes vested title in the bankrupt.

(b) That the bankrupt dictated the prices.

(c) That the bankrupt mingled the goods with his own.

(d) That there was no agreement that the accounts and bills receivable should belong to consignor.

(e) That some of the cases cited in the opening brief of The Miller Rubber Company and The Miller Rubber Company of California were decided prior to the amendment of 1910 to section 47, clause 2, subdivision a.

(f) That said conditions stamped the 1911 contract as a fraud upon the creditors of the bankrupt.

We will discuss these points as determined by the cases we have cited.

*In re Galt*, 120 Fed. 64 (U. S. C. C. A., Seventh Circuit).

(a) Galt guaranteed the notes, and if not paid in two months to "take up the same, and pay the cash to" petitioner. If not sold within twelve months, at the option of petitioner, the bankrupt to pay cash for said wagons or give his note, due in four months, therefor. As to this the court on page 69 say:

"The clause in the contract giving an option to the company to require Galt to give his note, or to pay in cash, or to store, subject to the order of the company, the goods not sold within 12

months, is probably the strongest clause in the contract to indicate a sale; but, as suggested by the Supreme Court of Illinois in *Lenz v. Harrison*, *supra*, while it might have such force considered alone, taking it with the whole contract, it was seemingly incorporated to compel the agent promptly to sell, and report sales within the time stated."

(b) No agreement limiting prices.

(c) No showing that the books were kept separately from the bankrupts.

(d) Proceeds of sale belonged to consignor.

(e) Case decided in 1903. It must be conceded that the United States courts in these matters have always followed the state decisions upon the subject, and so followed in that case. The law of that state held *conditional sales* void as to *bona fide* purchasers and attaching creditors. There was no such law as to bailments. Therefore, at that time—1903—a bailment contract was good as against the world, and necessarily was so held by the Circuit Court of Appeals.

The amendment of 1910 to section 47, clause 2, subdivision a, vests the trustee with all the "powers of a creditor holding a lien"; and also "with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

*In re Flanders*, 134 Fed. 560 (U. S. C. C. A., Seventh Circuit).

(a) Flanders advanced 50%, said advances being made by his notes payable to the leather company.



(b) Flanders dictated the prices.

(c) Flanders kept the goods in separate bins so far as practicable.

(d) Flanders was to account monthly for the proceeds of the sales, deducting freight charges and advances.

(e) Case decided in 1905. This case arose in Illinois, as the preceding one did, the court held it to be a *bailment*, and under the law of Illinois it was good as against attaching or execution creditors.

*The amendment of 1910 to section 47, clause 2, subdivision a of the Bankruptcy Act would not have affected the case.*

*In re John Deere Plow Company*, 137 Fed. 802  
(U. S. C. C. A., Eighth Circuit).

(a) The bankrupt agreed to pay for the goods in par funds, or give notes therefor.

(b) The bankrupt dictated the prices.

(c) No agreement segregating the goods.

(d) Proceeds of sales kept separate.

(e) Case decided in 1905, following a Missouri statute providing that conditional sales should "be void as to all subsequent purchasers in good faith, and *creditors* unless acknowledged and recorded." It is apparent, therefore, *that the amendment of 1910 to section 47, clause 2, subdivision a of the Bankruptcy Act would not have affected the decision.*

*In re Columbus Buggy Company*, 143 Fed. 859  
(U. S. C. C. A., Eighth Circuit).

(a) Bankrupt paid wholesale price less 5%.

(b) The bankrupt dictated the prices.

(c) No agreement limiting the mingling of goods.

(d) The bankrupt was to pay the Columbus Company the wholesale price less 5% discount.

(e) Case decided in 1906, following an Oklahoma statute rendering voidable at the instance of innocent purchasers or *creditors* of the vendee, a contract evidencing a *conditional sale*, unless deposited in the office of the registrar. The court held it to be a bailment, and the statute therefore did not apply.

“Such a contract is not affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers.”

*The decision would not have been affected by the amendment of 1910 to section 47, clause 2, subdivision a, of the Bankruptcy Act.*

Dunlop v. Mercer, 156 Fed. 545 (U. S. C. C. A., Eighth Circuit).

(a) Notes were given by the Western Company, which was the bankrupt.

(b) The bankrupt dictated the prices.

(c) The goods were mingled with bankrupt's other goods.

(d) The accounts and bills receivable belonged to petitioner, to be held as collateral and credited on the notes of the Western Company, the bankrupt.

(e) The decision was rendered in 1907, construing a Minnesota statute which provided that failure to record a contract of *conditional sale* rendered it voidable by attaching and judgment creditors and *bona fide*

purchasers. The court found that under the law of Minnesota there were no *bona fide* purchasers, attaching creditors or judgment creditors; it, therefore, being a valid contract of conditional sale, the title had not vested, and the petitioner recovered. Having applied the laws of the state, the amendment of 1910 to section 47, clause 2, subdivision a, of the Bankruptcy Act would not have affected the decision.

*In re Pierce*, 157 Fed. 757 (U. S. C. C. A., Eighth Circuit).

(a) The bankrupt was to guarantee the notes of purchasers.

(b) The bankrupt sold on specified terms.

(c) Nothing in the contract which prevented the mingling of goods.

(d) The bankrupt agreed to remit all cash received, less commission, and to make settlement for all implements ordered, at the close of the season, or whenever requested by petitioner.

(e) Case decided in 1907, and the court held the contract to be one of bailment for sale. It is not shown in what state the case arose. The court held that the trustee had no greater title than the bankrupt had.

*In re Stoughton Wagon Works*, 168 Fed. 857 (U. S. C. C. A., Eighth Circuit).

(a) The bankrupt gave notes for net amount of goods on hand per statement, due in six months' time.

(b) The bankrupt dictated the prices.

(c) Nothing preventing the mingling of goods.

(d) The bankrupt to report each month and to accompany the report with a full settlement for all goods reported sold, in cash and promissory notes at four months. The proceeds of all sales belonged to petitioner.

(e) Case decided in 1909. The court held it to be a contract for bailment or agency only, and that the title did not pass to the trustee.

*In re Gray*, 170 Fed. 638 (District Court, Oklahoma).

(a) The bankrupt gave his notes for the unpaid part of the purchase price.

(b) The bankrupt agreed "*to make settlement in accordance with prices herein specified within ten days from date of invoice, either in cash \* \* \* or by notes, in accordance with the terms hereinafter specified.*"

(c) The bankrupt was given unlimited power to sell the property in the course of his business as a merchant, nothing preventing the mingling of goods with his own.

(d) It being a contract of conditional sale the accounts and bills receivable belonged to the bankrupt.

(e) Case decided in 1908. The sale made in Oklahoma, the property delivered in Indian Territory, and not required to be recorded under the local law, the court held the contract valid between the parties, and as against third persons. The court applied the local law. Therefore, *the amendment of 1910 to section 47, clause 2, subdivision a, of the Bankruptcy Act would not have affected the decision.*



*In re Bailey*, 176 Fed. 628 (District Court, South Carolina).

(a) Notes were not given, but the bankrupt agreed to pay for the paint when sold at the end of sixty days.

(b) Nothing to indicate petitioner controlled the price at which sold.

(c) Nothing to prevent the mingling of goods.

(d) Nothing indicated as to accounts and bills receivable because the bankrupt was to pay for the goods.

(e) Case decided in 1910, construing a South Carolina statute, the full statute concerning which is covered by the first syllabus:

“Under Civ. Code S. C. 1902, sec. 2655, which provides that every agreement of purchase or bailment of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same, shall be void ‘as to subsequent creditors or purchasers for a valuable consideration without notice,’ unless in writing and recorded as required of mortgages, *as construed by the Supreme Court of the state*, an agreement of *consignment* under which goods were delivered to a bankrupt to be sold and accounted for as agent, otherwise valid, is not void as against the bankrupt’s trustee, or general creditors, because not recorded.”

The court followed the state law, and hence the amendment of 1910 to section 47, clause 2, subdivision a, of the Bankruptcy Act could not have changed the decision.

*In re Smith*, 192 Fed. 574 (District Court, Maryland).

- (a) The agent or purchaser to give notes.
- (b) Minimum price given, but nothing to prevent agent from selling at any higher price if he chose to do so.
- (c) Nothing to prevent mingling of goods.
- (d) The bills and accounts receivable belonged to the bankrupt because the contract provided for a cash settlement and a somewhat larger price for settlement by note.
- (e) Case decided subsequent to the amendment of 1910 to section 47 of the Bankruptcy Act. There was no Maryland statute upon the subject. The court held it to be one of consignment to the bankrupt as agent.

*In re Farmers' Co-operative Company*, 202 Fed. 1005 (District Court, North Dakota).

- (a) Nothing to indicate notes were given.
- (b) The bankrupt dictated prices.
- (c) The goods were mingled with the bankrupt's goods.
- (d) The accounts and bills receivable evidently belonged to the bankrupt because it was a conditional sale with reservation of title in the petitioner until paid for.
- (e) The case was decided in 1913, the first syllabus being:

“Bankruptcy Act July 1, 1898, c. 541, sec. 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, sec. 8,

36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which vests a trustee as to all property in the custody or coming into the custody of the bankruptcy court with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, does not give him a right to property in the possession of the bankrupt but not paid for, which was delivered to him under a contract of conditional sale reserving title in the seller until payment of the price, and which was recorded in accordance with the laws of the state prior to the bankruptcy."

Wood v. Vanstory, 171 Fed. 375 (U. S. C. C. A., Fourth Circuit).

(a) The bankrupt was to account for goods sold upon making his annual settlement.

(b) The bankrupt sold to his customers upon his own terms.

(c) Nothing to indicate that goods were not mingled with his own.

(d) Evidently the bills and accounts receivable belonged to bankrupt because the machines sold "were charged to the bankrupt." When the yearly inventory was taken the bankrupt was required to make settlement for the same.

(e) Case decided in 1909, holding that the contract was one of bailment, more fully expressed by the third syllabus:

"Petitioner, a manufacturer of farm machinery, shipped machines by the carload to the bankrupt, which was a hardware company, under a contract by which the bankrupt received and stored the

same and from time to time shipped machines out on orders from petitioner. The machines were not charged to the bankrupt, nor invoiced as part of its stock, but it was paid an agreed price for storage and transfer. It had the privilege of selling any of the same to its own customers, and *machines, when so sold, were charged to it.* At the end of the year an inventory was taken by petitioner of the machinery then on hand in storage. *Held*, that the transaction was a bailment, the title remaining in petitioner, and that on the bankruptcy it was entitled to reclaim possession of the machines on hand from the bankrupt's trustee."

*In re Reynolds*, 203 Fed. 162 (District Court, Kentucky).

(a) For goods sold on time the agent executed notes due in four months for the invoice price.

(b) A minimum price was fixed but not a maximum price at which the goods might be sold.

(c) Nothing to prevent mingling of goods.

(d) Bills and accounts receivable to be the property of petitioner.

(e) The case was decided in 1912. Construing the amendment to section 47a in 1910 the court said:

"It is only on the basis that it was a *bailment for sale* that the petitioner was entitled to any relief. I think that the contract was a bailment for sale under these authorities." (Citing a number of cases.)



Berry Bros. v. Snowden, 209 Fed. 336 (U. S. C. C. A., Ninth Circuit).

(a) The bankrupts "agree to pay for such goods sold by them" each month from said stock, "or take over consigned goods while in their possession on the terms at which they are billed by the party of the first part on their regular invoice."

(b) Nothing to indicate prices were not dictated by bankrupt.

(c) Nothing to indicate goods were not mingled with their own.

(d) Accounts and bills receivable evidently belonged to bankrupts, who agreed to pay for the goods sold by them.

(e) Case decided in 1913, construing which the court said:

"And while it is true that under the amendment of the Bankruptcy Act of June 25, 1910, a trustee in bankruptcy is vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, the lien so given is a lien on the *property of the bankrupts* and *not a lien on the property of third persons.*"

It is significant that the court held the contract to be one of bailment "*under which title did not pass to any of the goods except those removed by, and regularly billed to, the bankrupts.*"

*In re Lane Lumber Company*, 217 Fed. 550  
(U. S. C. C. A., Ninth Circuit).

The first and second syllabi are:

1. "Under Rev. Codes Idaho, Secs. 3441, 3443,

which give a vendor a lien on real property sold 'valid against every one claiming under the debtor except a purchaser or incumbrancer in good faith and for value,' such a lien is valid as against the trustee in bankruptcy of the purchaser."

2. "The purpose of the amendment of Bankr. Act, Sec. 47a (Act July 1, 1898, c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), by Act June 25, 1910, c. 412, Sec. 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500)), by providing that as to all property coming into the custody of the bankruptcy court the trustee shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, was to confer on the trustee the power to contest the sufficiency of any claimed lien, pledge, or security that a lien creditor or judgment creditor might challenge had bankruptcy not intervened, but it does *not prescribe any rule* by which the *validity* or *priority* of such liens is to be determined, and a *lien* which is *valid under the state law as against the claims of such creditors is valid under the bankruptcy law against the trustee since the amendment as well as before.*"

On page 552 the court say:

"It is claimed that the effect of this amendment is to vest in the trustee, as against all secret or unrecorded liens, such as that involved, a title and equity in the property, for the benefit of the creditors of a bankrupt, superior in character to that of the lien of the vendor in all instances where the latter has failed to disclose his claim of lien by some appropriate proceeding to enforce it prior to the vesting of the property of the estate in the hands of the trustee. But we think that this con-

tention involves a misconception of the purpose and effect of the amendment in question. Prior to its adoption the trustee was without power to question the validity of an asserted lien upon the property of the estate, however, defective, if the defect were one which could not have been availed of by the bankrupt, the trustee being vested with no higher right as to the property than that possessed by the bankrupt at the time of the devolution of the title upon the trustee. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and cases there cited. The amendment was obviously designed to cure what was deemed a defect in this regard, and to confer the power upon the trustee, in the interest of the general creditors, to contest the sufficiency of any claimed lien, pledge, or security that 'a lien creditor or a judgment creditor might challenge had bankruptcy not intervened.' *Loveland on Bankruptcy* (4th Ed.), Sec. 372. There is nothing in the amendment indicating that its purpose was to prescribe a rule by which the validity or priority of such liens is to be determined or enforced. In that respect the law is left untouched, and the validity and rank of the lien is now to be ascertained by the same applicable principles as obtained prior to the change; and 'a lien which is valid under the state law as against the claims of such creditors, is valid under the bankrupt law as against a trustee since the amendment as well as before.' *Id.* The amendment, in other words, was designed only to clothe the trustee with the right to question the validity of any lien claimed against the property of the estate which may be defective under the law creating it, notwithstanding the bankrupt might have been estopped to do so. *Pac.*

State Bank v. Coates, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846. It goes no further. It does not affect the character of the trustee's title as such. That is defined in section 70 of the act, which clothes the trustee only 'with the title of the bankrupt as of the date he was adjudged a bankrupt.' "

General Electric Co. v. Brower, 221 Fed. 597  
(U. S. C. C. A., Ninth Circuit),

(a) The bankrupt was to pay for the lamps sold each month less 29% for making the sales. In another provision the bankrupt guaranteed that all lamps sold by it would be paid for.

(b) Prices and terms were fixed by petitioner.

(c) Nothing to prevent the mingling of goods with its own.

(d) "Nor was the contract rendered a contract of sale by reason of the fact that it contained no provision that the agent should keep the money separate and apart from its other monies, or that it should turn over the money received from the sale to the manufacturer, but instead was to pay for the lamps sold each month less 29% for making the sales."

(e) Case decided in 1915, arising in the state of Washington.

It is evident that since it was a contract of bailment for sale, following the principle laid down in *Berry Bros. v. Snowden*, *supra*, any right which the trustee might have had under the amendment of 1910 of section 47a of the Bankruptcy Act, it would only apply as to "the property of the *bankrupts* and not the *property of third persons*."



*In re Ellet-Kendall Shoe Co. v. Martin*, 222 Fed. 851 (U. S. C. C. A., Eighth Circuit).

(a) The bankrupt agreed to make weekly reports, and accompany said report with check covering payment for goods sold.

(b) Sales made at the net marked prices.

(c) Nothing to prevent mingling of goods.

(d) Accounts and bills receivable evidently belonged to the bankrupt because of their agreement to pay for the goods sold.

(e) Case decided in 1915. The contract was never recorded.

As to the rights under section 47a as amended the court on page 855 say:

“Counsel for appellee apparently concede that if the transaction of June 12 (date of the contract) was in effect a *consignment* of the shoes by the petitioner to the bankrupts for *sale on commission*, the petitioner would be entitled to recover the shoes not sold at the time of the bankruptcy or to the proceeds if sold by the trustee.”

*In re National Home and Hotel Supply Co.*, 226 Fed. 840 (District Court, Michigan).

(a) Apparently no notes were given.

(b) Bankrupt fixed the retail prices and terms of sale.

(c) Petitioners' wares were not kept separate from other goods in bankrupts' store.

(d) No reservation of the title to the proceeds of the goods sold, nor was the bankrupt required to keep separate, or remit the identical money taken in on sales

of petitioners' goods, and bankrupt comingled said proceeds with its general funds.

(e) Case decided in 1915. Construing the amendment of 1910 of section 47a of the Bankruptcy Act, HELD, that said amendment does not divest title of the bailor.

On page 848 the court say:

"This point was passed upon *In re Wright-Dana Hardware Company*, 211 Fed. 908, 128 C. C. A. 286, 31 Am. Bankr. Rep. 764 (C. C. A., Second Circuit, 1914), affirming (D. C.) 205 Fed. 335, 30 Am. Br. 583, wherein it was said (in referring to Bankruptcy Act, Sec. 70, Comp. Stat. 1913, Sec. 9654, construed with the amendment to Sec. 47 St. Sec. 9631):

"‘We do not, however, understand that this clause includes or was intended to include property in the hands of a bankrupt, bailee, or of a bankrupt agent, who never had the title, but who may have had a right to sell the property for the benefit of his bailor or principal. It is impossible to give the act any such construction. The bailor cannot thus be divested of his title.’”

*In re Wright-Dana Hdw. Co.*, 211 Fed. 908  
(C. C. A., Second Circuit).

The fourth syllabus is:

"Bankruptcy Act of July 1, 1898, Sec. 70, providing that the bankrupt's trustee shall be vested by operation of law with the title of the bankrupt to 'property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied on and sold under judicial process against him,' does not include property in the hands of a bankrupt bailee or of

*an agent who never had title, but who may have had a right to sell the property for the benefit of the bailor or principal."*

LATER CASES.

*In re* Charles E. Reeves, 36 Am. Br. 130 (District Court of New York).

The foregoing case is reported in the advance sheets of Volume 36, American Bankruptcy Reports for March, 1916.

In that case the bankrupt, C. E. Reeves, entered into a contract with one Wirt, who agreed to *furnish* the bankrupt an assortment of fountain pens "on consignment," at a *discount of 40% from the list*, with rebate privileges. Reeves was to sell the pens at regular retail prices fixed by Wirt, and make remittances each ninety days. By express provision Reeves was liable for all loss from any cause.

"The agreement to be terminated by Wirt at any time, and in such event Reeves was to '*make payment for all goods sold and not paid for*' (meaning, of course, that Reeves was to pay for such goods as he had sold and failed to remit for, less his rebate), and return all pens not sold, and also showcases, etc., furnished by Wirt."

Forty-eight pens were delivered, accompanied by an invoice reading as follows:

"Paul E. Wirt. Fountain Pen Terms: Remit every 3 months for goods sold.

"Bloomsburg, Pa., Aug. 26, 1912.

"Sold to Mr. Chas. E. Reeves, 61 Chenango St., Binghamton, N. Y.: (Here followed an itemized list of 48 pens, with prices.)"

“The invoice in its terms and language plainly imparts an absolute sale of the pens, but read in connection with the agreement referred to it is plain that Reeves received and held the pens for sale on consignment, and that the trays, etc., belonged to Wirt; the title to the pens being in Wirt.”

The proceeding was to reclaim the pens on hand at the time of the bankruptcy of Reeves. The first syllabus states the rule and the law of the case:

“A manufacturer of fountain pens agreed, in writing, to furnish them ‘on consignment’ at a discount, with rebate privileges, the consignee to sell them and make remittance at stated intervals. It is expressly provided that the consignee should be responsible for any and all loss from any cause whatever. The invoice stated that the pens therein described were *sold to the consignee*. HELD, that while the invoice in its terms imparted an absolute sale, when read in connection with the agreement, it is plain that the consignee held the pens for sale on consignment, and that title remained in the consignor, and did not pass to the consignee’s trustee in bankruptcy.”

Cole Motor Car Co. v. Hurst, 228 Fed. 280  
(U. S. C. C. A., Fifth Circuit).

The foregoing case is found in the advance sheets of the Federal Reporter of date February 24th, 1916.

In this case the Cole Company made an agreement with Hurst to become the distributor of the Cole Company’s automobiles for certain counties in Texas. Failing to remit, the suit was against Hurst and his guarantor.



The proceeding was not in bankruptcy.

The contract provided that Hurst was to be paid a commission on each sale; *to remit to plaintiff for each car as it was sold by him; the cars to be invoiced to him at a price to the purchaser fixed in advance by the Cole Company.*

The question presented was: Did the contract constitute Hurst as agent or consignee, or did it evidence a sale of cars to him?

Hurst agreed that if he cancelled the contract he would take and pay for all cars on hand or in transit.

“As to the amount of Hurst’s interest it appears that the goods were to be *invoiced* to him at the regular catalogue price subject to a discount of 25%. *This discount, of course, constituted his profit*, unless, in deed, he sold the cars for less than the catalogue price, in which event *his commission was to be the difference between the price at which the cars were sold, and the discount, after the list price had been taken off, which was the invoice price.*”

On page 282 the court say:

“That the plaintiff regarded the contracts as of consignment is made plain by the fact that *the original action is brought as upon contracts of consignment*. When, however, the court, over the plaintiff’s objection and exception, held them to be contracts of sale, the plaintiff was driven to proceed as if they were sale contracts. Having saved its exception, this was its only resource, and we are not precluded by this enforced change of attitude from regarding the contracts in their true light. *Indeed, if there were two reasonable interpretations of the contract, one defeating the plain-*

*tiff's meritorious claim, and the other enforcing it, the court would be at liberty to adopt the latter."*

The third syllabus is:

"Contracts between a manufacturer of motor cars and a dealer, designated as a distributor, provided that *cars would be invoiced to the distributor at the regular catalogue price*, subject to certain discounts constituting his profit; that he should have the exclusive right to sell the manufacturer's cars in certain designated territory within the state of Texas, and not elsewhere; that remittances for all cars shipped to him would be made the same day that the cars were sold; that, when cars were shipped direct to his agents, sight drafts would be drawn and a check mailed by the manufacturer on Monday of each week, covering commissions due on shipments for which payments had been received during the previous week; that the distributor would keep the cars insured in the manufacturer's name until sold and paid for; that if the contract was cancelled the manufacturer would take over any new cars then on the distributor's floor at the invoice price with carload freight added; and that if the distributor cancelled the contract he would take and pay for all cars on hand or in transit. The contract was made in Indiana, and the cars to be shipped from Indiana f. o. b. to the distributor in Texas. HELD, that the transaction was a consignment, and not a sale, and the contract was an interstate one the validity of which was covered by the federal anti-trust laws and not by the anti-trust laws of Texas."

RESUME.

The following points are especially cognizable in nearly all the cases cited, *including the facts of the case at bar*.

1. a. In most of the cases notes were given by the bankrupt.

b. Notes were given by the bankrupt in the case at bar.

2. a. In nearly all of the cases cited the bankrupt dictated the prices or terms upon which the goods were sold, excepting that in most of the cases a minimum price was fixed.

b. In the case at bar the minimum prices were fixed by the tenth paragraph of the contract of 1911 (p. 92) but the bankrupt might sell at any higher price he chose.

3. a. In most of the cases cited the mingling of the goods was considered by the court to have no legal effect whatever.

b. This was somewhat true in the case at bar, except that there was testimony that there were signs up with The Miller Rubber Company's name on them (p. 40).

4. a. In many of the cases there was no agreement that the accounts and bills receivable belonged to the consignor for the reason that the consignee was to give notes or pay cash for all goods sold by him.

b. In the case at bar the 1911 contract provided "remittances to be mailed to first parties on the tenth of each month for previous month's sales" (par. 6, p. 91).

5. a. Some of the cases cited by us were decided prior to the 1910 amendment of section 47a of the Bankruptcy Act, and a number of them after said date. Following the construction of section 47a as placed upon it by this Honorable Court *In re Lane Lumber Company*, 217 Fed. 550, we urge that "there is nothing in the amendment indicating that its purpose was to prescribe a *rule* by which the *validity* or *priority* of such liens is to be determined or enforced. *In that respect the law is left untouched*, and the validity and rank of the lien is now to be ascertained by the same applicable principles as obtained prior to the change, *and a lien which is valid under the state law as against the claims of such creditors*, is valid under the bankrupt law as against a trustee, *since the amendment as well as before it.*"

It might be added that in most of the cases cited by us, and decided previous to the amendment of 1910 of section 47a of the Bankruptcy Act, the question properly arose under the construction of a state statute, which rendered certain contracts voidable as to purchasers, incumbrancers and *creditors*,—the cases having been decided upon the ground that, since the property belonged to a *third person*, and *valid as against all the world*,—that its validity could not be impugned by the trustee. The rule would not be changed, therefore, by the 1910 amendment of section 47a.

b. Assuming that the case at bar hinges upon the law of California with reference to the reservation of title in the consignor, the question of whether the property to be consigned was for *sale* or *consumption* seems quite immaterial for the reason that if it belonged to



a *third person*, it would be valid as against either the bankrupt, his execution or attaching creditors, and also his trustee in bankruptcy.

On page 22 of opposite counsel's brief the rule in California is stated to be against "upholding secret liens and charges to the injury of *innocent purchasers, or incumbrancers for value.*"

In *Liver v. Mills*, 155 Cal. 459, cited by opposite counsel, the contract did not contain the provision, as expressed in the case at bar, on default of the vendees the vendors might retake possession. It lacked that main element favorable to the consignor.

The first and second syllabi are:

1. "The validity of conditional sales of personal property is fully recognized in this state; and even *bona fide* purchasers from one to whom personal property has been delivered upon conditional sale, under an executory contract, reserving title in the vendor until the purchase money is fully paid, obtain no valid claim to the property superior to the rights of the original purchaser."

2. "When a contract for the sale of personal property expressly reserves title in the vendors until the purchase money is paid the title carries with it the right of possession in case of default, though such contract does not contain the usual provision to that effect."

*These cases being upon contracts of conditional sale, with greater reason may the petitioners recover the property in this case, having placed it with the bankrupt on consignment for sale only, and with no intention of parting with title to the bankrupt, reserving*

title "until sold and delivered to bona fide customers in the usual manner" (par. 4, p. 91).

#### FRAUD.

6. a. In all of the cases cited the question of fraud was not raised.

b. In the case at bar counsel have not even attempted to raise the question of fraud in the dealings of the parties herein, whereby the property was placed with the bankrupt under the 1911 contract for sale in the usual manner.

#### GIVING OF NOTES.

We have referred to the giving of notes as not being a material element necessarily showing a sale, when due consideration is given to the entire contract. It is true that the seventh paragraph of the contract of 1911 (p. 92) provides that notes will be accepted for all purchases made by the bankrupt.

However, when read in connection with the entire contract it was evidently the plain intention of the parties, as stated by Mr. Justice Caldwell in *Met. Nat. Bank v. Benedict*, 74 Fed. 182, that money to be paid was not upon a sale of the goods *to* the bankrupt, but upon a sale of the goods *by* the bankrupt; and in all of the cases which we have cited, the giving of the notes in accordance with such an agreement *to pay* for the goods by the bankrupt, *did not have the effect of passing title to the goods on hand; but was only an additional security guaranteed to the consignor of the goods by the mutual agreement of the parties, following Sturm v. Boker*, 150 U. S. 312.

In *Leschen v. Mayflower*, 173 Fed. 855 (U. S. C. C. A., Eighth Circuit), certain materials were delivered by Leschen to a mining company, defendant, with the reservation of title and the right to take possession thereof "in default of the last payment being made." The mining company made all payments, except the last, and gave its note for that, but never paid the note. After the note was dishonored the Leschen Company replevied the materials and the District Court dismissed the action upon the ground that the mining company—the defendant—had made the last payment in accordance with the agreement *by giving the note*. On appeal the U. S. Circuit Court of Appeals held that the title was reserved, notwithstanding the giving of the note, and reversed the case for further proceedings in accordance with its decision.

#### 1914 CONTRACT.

Counsel having referred to the 1911 contract, and the termination thereof, in their brief, on page 47, say: "If the contract of 1911 were terminated by the contract of 1914, such termination would not alter the status of the goods shipped under the 1911 contract, and *on hand* at the time of the filing of the petition in bankruptcy." The statement assumes a common fallacy. By the express provisions of the contract of 1914, viewing it in connection with all the facts stated by us in our opening brief, page 55 *et seq.*, we cannot conceive upon what possible ground it might be said that the 1911 contract was maintained after June 11th, 1914, for any purpose "*except as to the unpaid ac-*

*counts'*—the unpaid accounts having been expressly reserved in the cancellation of said contract (p. 140). The assumption of counsel, quoted above, would lead to the conclusion that there was a direct hiatus in the status of the goods on hand at the time of the filing of the petition in bankruptcy, and now claimed by petitioners, between June 11th, 1914, and March 20th, 1915,—the date of the filing of the petition in bankruptcy—which would be an absurd conclusion.

Every fact and circumstance in connection with the making of, and the carrying out of, the 1914 contract clearly shows the intention of the parties concerned “to make a new slate entirely” as of the date of the 1914 contract, except as to the unpaid accounts.

#### COMMISSIONS.

In counsel's brief, page 11, in reference to the commissions alleged to be due to the bankrupt from The Miller Rubber Company of California, which finding and decision of the special master was reversed by the District Court, and which is the basis of the trustee's appeal—the facts are incorrectly stated. Counsel makes the direct statement that “the price at which the goods were *actually sold* was \$95.00, and that Newerf's compensation, instead of \$35.00, should be \$30.00.” Counsel assumes that Mr. Newerf would bear the loss of the entire \$5.00.

The facts are these: The contract provides (p. 98) that the bankrupt's commission is to be the difference between the price at which goods are *actually sold* and 10-12½-12½-5% from the price list. 10-12½-12½-



5% off price list leaves a price of 65.46%. The difference between this and price list—100%—leaves bankrupt at all times entitled to 34.54% of the actual selling price of the goods.

The District Court must have found from all of the facts of the Mushet Audit Company—which made a complete audit, as shown by the record (p. 82), taking the bankrupt's view of the facts, and The Miller Rubber Company's view of the facts (p. 21),—that the computation made by said Mushet Audit Company was *based upon the cash received*.

Now, if goods were sold and invoiced at \$100.00, and the customer took advantage of the 5% and paid \$95.00 cash, the bankrupt's commission would be 34.54% of \$95.00, or \$32.81. The Miller Rubber Company would obtain 65.46% of \$95.00, or \$62.19. There is, therefore, \$5.00 which is *lost* to the bankrupt and to The Miller Rubber Company. The Miller Rubber Company would lose the difference between \$62.19 and \$65.46, or \$3.27. The bankrupt would lose the difference between \$32.81 and \$34.54, or \$1.73.

So, that, it being an equal advantage both to the bankrupt and to The Miller Rubber Company to obtain collections, since each was interested proportionately, each lost proportionately, when the customer paid cash. We know of no more equitable rule than the foregoing; and this is the exact conclusion which we urge is the only one to be reached and which the District Court concluded is correct.

The parties used the words "actually sold" and "price list" (p. 98) for the evident purpose of dis-

tinguishing between *price list* or *invoice price*—both being usually the same—and *the actual amount of money received* for sales made by the bankrupt, so as to give the bankrupt 34.54% of the *actual amount of money received for a sale*. If they had wanted to give him 34.54% of the *price list*, or *invoice price*, they certainly would not have incorporated into the contract the provision that his commissions are “the difference between the *price* or prices at which goods are *actually sold* and 10-12½-12½-5% from the *price list*.”

Further, it will be borne in mind, and is conceded and claimed by counsel for the trustee, that Newerf was not hampered as to the price at which he sold goods, except as to the *minimum* price. He might have sold goods and received in cash 110% of the list price. In that case his commission would properly be 34.54% of \$110.00—using the concrete figures.

It will be seen that the bankrupt sold approximately \$90,000.00 worth of goods based upon the invoice price—but received therefor approximately \$85,500.00 *in cash*, the customers for said sales having taken advantage of the 5% discount. The trustee claims Mr. Newerf should have 34.54% of \$90,000.00, whereas his sales amounted to \$85,500.00. It seems to us to take this view of the case not only gives the bankrupt *something for nothing*, but violates the plain language, intent, meaning and purpose of the contract between the parties.

CONCLUSION.

Concluding, therefore, we respectfully urge all the matters and facts set forth in our opening brief, especially at pages 68 and 69, and ask for judgment accordingly.

Respectfully submitted,

BICKSLER, SMITH & PARKE,  
*Attorneys for The Miller Rubber Co. and The Miller  
Rubber Co. of California.*

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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

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The Miller Rubber Company, a  
corporation, and The Miller  
Rubber Company of California,  
a corporation,

*Appellants,*

*vs.*

Citizens Trust & Savings Bank, a  
corporation, as Trustee in Bank-  
ruptcy of the Estate of W. D.  
Newerf, doing business as W.  
D. Newerf Rubber Company,  
Bankrupt,

*Appellee.*

No. 2737

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PETITION FOR REHEARING.

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*Attorneys for The Miller Rubber Company and The  
Miller Rubber Company of California.*





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PETITION FOR REHEARING.

*To the Honorable United States Circuit Court of Ap-  
peals for the Ninth Circuit:*

Now comes The Miller Rubber Company, a corpora-  
tion, and The Miller Rubber Company of California,  
a corporation, appellants herein, and for their petition  
for a rehearing herein respectfully present to the court  
the following grounds:

I.

The principal question before the court being the construction of the contracts of November 6th, 1911, and June 11, 1914, set forth in the transcript of record at page 90, *et seq.*, it must be conceded that the construction of said contracts depends upon the law of the state of California, upon the ground that the United States courts follow the decisions of the state courts upon all such questions as here presented.

Authority for this is found in:

Thompson v. Fairbanks, 196 U. S. 516;

Humphrey v. Tatman, 198 U. S. 91;

York Mfg. Co. v. Cassell, 201 U. S. 344;

Dale v. Patterson, 234 U. S. 399.

First syllabus:

“The legal effect of a transaction involving pledge or hypothecation depends upon the local law; and if the state law permits the pledged property to remain under certain conditions in the possession of the pledgor, and those conditions exist, the trustee in bankruptcy of the pledgor takes subject to the rights of the pledgee.”

Taney v. Penn. Bank, 232 U. S. 174.

In fact counsel for the trustee, on page 21 of their brief say:

“The cases in bankruptcy state that, where possible, the laws of the state in which the controversy arises, should be looked to for a rule to govern the decisions of the bankrupt courts. Under the laws of the state of California, conditional sale contracts are valid; but the cases in which they have been held to be valid,

have been cases in which the property to be consigned was not for sale or consumption by the vendee," and then cite a number of cases upon the subject.

## II.

Counsel in their brief suggest that conditional sales are only valid as to property which was not for sale or consumption.

In Vermont Marble Company v. Brow, 109 Cal. 236, the first and second syllabi are:

First syllabus:

"Where goods are delivered on consignment under a contract that they are to be paid for by the consignee at a listed price when sold, and to remain the property of the vendor until paid for, with the right in the consignee to sell them for any price he may fix in his own name, the transaction is a sale to the consignee upon condition, the condition being that the consignee shall sell to some third person, until which time he is under no obligation to pay the listed price, and may be compelled to surrender the goods to the consignor upon demand; and prior to sale by him the consignee has no title which can be the subject of levy or sale upon execution for his debts."

Second syllabus:

"The seller has a common law right by appropriate contract to retain the title in himself until the performance of some valid condition on the part of the buyer, and *the fact that the property is to be resold by the first purchaser does not affect the rule.*"



Opinion:

“Defendant was constable of Marysville township in Yuba county, and was sued in this action by plaintiff, a corporation, for the value of certain marble monuments sold by him July 10, 1893, under writs of execution issued from the justice’s court of said township against the property of one Plymire upon judgments obtained there by creditors of Plymire. *The chief question involved is whether the marble when levied upon and sold was the property of plaintiff or of said Plymire.* The latter had a marble shop at Marysville and was a dealer in funerary stones and monuments; he had been accustomed for several years to purchase from plaintiff unfinished monuments and other marble needed in his business, and on July 19, 1892, he was in plaintiff’s debt some \$2,500.00 for such materials purchased previously to that time, and plaintiff was apprehensive that further sales to him outright would involve loss; to prevent this Plymire agreed in writing with the marble company on the date last mentioned, that in consideration of its sending to him certain specified monuments ‘on consignment’ he would hold the same as the property of the company until sold, and subject to its order; that as fast as he sold the monuments he would remit the money—the cost price at which each was listed to him—and when he took notes in lieu of cash he would remit the notes as collateral for his account. Subsequently, in May, 1893, Plymire agreed with plaintiff for a further consignment of goods, specifically described, written memoranda of which agreement provided in substance that he should keep an account of the sale of the monuments described in

a book, and send such book to the marble company on the first of each month, and, 'as fast as said work is sold and erected' pay to the company the list or cost price to him of each piece of marble sold by him, 'either by cash or customers' notes,' the same to be placed to his credit as fast as cash should be received; that he held the marble merely on consignment to be paid for when sold, and that it remained the property of the marble company 'until paid for, as above,' and at all times subject to its order. Ten monuments, of the value of \$683.00, were converted by defendant, as the court found, and of these, three had been delivered to Plymire under his arrangement with plaintiff of July, 1892, and seven under that of May, 1893. By the terms of an oral agreement not embodied in said written memoranda Plymire promised that whenever he received payment from a customer for a monument he would pay plaintiff an additional sum of 25% on the cost price charged to him for the same by plaintiff; which further percentage was to be applied on his indebtedness of \$2,500.00 existing before July, 1892. The debts on which the judgments mentioned were recovered against Plymire accrued prior to the receipt by him of any part of the goods in controversy.

"Plymire, it was understood, would take orders for and sell the marble in his own name; he had the right to fix the selling price and the terms of sale; he was to bear the cost of transporting the marble from San Francisco to Marysville; apparently the marble company exercised no control over his business. The monuments, when seized by defendant, were in the same condition as when received by Plymire from plaintiff, he having done no lettering or other work on them. He testified

at the trial: 'I was not to sell these monuments in the same condition that I received them. I have to sell them first and then put on the inscription. If a man wanted a design I showed him a style of monument and told him what it would come to when finished and set up; found out how he wanted it lettered, whether he wished any further design carved on it, and then fixed it up, put a bottom base on it, set it up, and then took the money for it.' Before the execution sale plaintiff demanded the property of defendant, the particulars of which demand appear in another connection.

"*Appellant contends* that the facts stated evidence a *sale* on credit in which the title to the goods passed at once to Plymire, and *they thus became liable to execution for his debts*, and it is said that it is 'unmeaning for parties to a contract to say it shall not amount to a sale when it contains every element of a sale.' This latter proposition is doubtless correct; *the transaction must be judged by the intent of the parties to it*, gathered from the whole scope and effect of their language and their explanatory conduct; mere verbal formulas are to be disregarded if inconsistent with a specific intent thus manifested. But looking at the facts in the light of this principle *we find no transmission of title to Plymire*. 'Mere transfer of possession without the agreement, express or implied, that such transfer is a sale on the one hand and a purchase on the other, will not be a sale or have the effect to transfer the title.' *Borland v. Nevada Bank*, 99 Cal. 94, 37 Am. St. Rep. 32. We consider that the true nature of the transaction was that of a sale upon condition—the condi-

tion being, as to each monument, that *Plymire should sell the same to some third person*; until then he was under no obligation to pay plaintiff the cost price, and until then he was compellable to surrender the goods to plaintiff upon demand. When he sold a monument he was precisely within the case put by Mellish, L. J., in *Ex parte White*, 6 L. R. Ch. App. 397, 405: 'If A hands over his goods to B, and B is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and then B sells to C, the natural inference from these facts is, beyond all doubt, that there is a sale made to B, and another sale from B to C.' *But obviously there is no completed sale to B until he sells to C*; this is illustrated in *Nutter v. Wheeler*, 2 Low. Dec. (U. S. Dist. Ct.) 346; there W. and Company were in the habit of sending their manufactured goods to one Gear in Boston, and *Gear sold them at such prices and on such terms as he pleased*, not less than the trade prices fixed by W. & Co.; whenever he made a sale he was to pay W. & Co. in thirty days the prices shown in their list to him, less an agreed discount; after a sale was made by him his credit only was looked to by W. & Co.; *Gear became bankrupt*, and W. & Co. took back the goods of their manufacture in his shop unsold. The court said: '*Until a sale was made the property in the goods remained in the defendants (W. & Co.), and they were well justified in reclaiming those which remained on hand at the time of the failure of Gear.*' So, in our opinion, at the time of the levy and sale by defendant here the monuments were the property of plaintiff and not liable to execution for *Plymire's debts*.



“As suggested by appellant there may be impolicy in allowing a severance of title and possession where an ultimate sale is designed by the parties, but this consideration is for the legislature and not the courts; the common law right of the seller by appropriate contract to retain the title until performance of some valid condition on the part of the buyer has been long recognized in this state, as almost universally elsewhere. (*Putnam v. Lamphier*, 36 Cal. 151; *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 597; *Sere v. McGovern*, 65 Cal. 244; *Benjamin on Sales, Bennetts’* (6th ed.) 255, 282 *et seq.*)

*“That the property is to be resold by the first (conditional) purchaser does not affect the rule. (Hirsch v. Steele, 10 Utah 18, and cases cited.)”*

We respectfully urge for the earnest consideration of the court that the above case is decisive of the case at bar, that in the case of goods placed on consignment with the right of sale with reservation of title in the consignor, that no title passes to the consignee “which can be the subject of levy or sale upon execution for his debts.”

That a careful reading of the *Vermont Marble Company v. Brow*, *supra*, will show that the contract was almost identical to the contract in the case at bar.

We further offer for the careful consideration the case of *Van Allen v. Francis*, 123 Cal. 474. This was a sale of a printing press, deferred payments being evidenced by promissory notes and an agreement that said payments should be secured by first mortgage on the property, upon the payment of which the consignor

agreed to execute and deliver a bill of sale. The consignee sold and delivered the property to a corporation, which "had no knowledge nor notice that said contract was in existence in regard to said press and said property, but only had knowledge that it appeared from the books of said William M. Langton (consignee) that an indebtedness of \$1,400.00 was due to Van Allen and Boughton (consignors)." No mortgage was executed on the property. Later the corporation assigned to one Hansbrow all of its property for the benefit of creditors and before the commencement of the suit said Hansbrow conveyed the press to defendants Francis. "*Neither the corporation nor Hansbrow, nor the defendants, had any knowledge of any claim of the plaintiffs to be the owners of the property.*" On page 477 the court say:

"The nature of the contract between plaintiffs and Langton first invites consideration. By appellants it is insisted that it shows an absolute sale of the property; by respondent, that the contract is one of conditional sale. We think the latter construction is the true one. Conditional sales are recognized in this state to the fullest extent. (Putnam v. Lamphier, 36 Cal. 151; Kohler v. Hayes, 41 Cal. 455; Hegler v. Eddy, 53 Cal. 597; Sere v. McGovern, 65 Cal. 244; Lowe v. Woods, 100 Cal. 408, 38 Am. St. Rep. 301); and it is well settled that even *bona fide* purchasers from the person to whom personal property is delivered under an executory contract of sale get no valid claim to the property. (Palmer v. Howard, 72 Cal. 293, 1 Am. St. Rep. 60.)

“The question whether or not a given contract is or is not a contract of conditional sale is to be determined *wholly by the intent of the parties*, expressed in and deducible from the contract itself. In arriving at the solution of the question, the whole contract is to be considered, and no detached term or condition is to be given prominence or effect over and above another. So that, if the legal effect of the whole contract be to establish a mortgage or a lease or an option to purchase between the parties, the mere negation in another part of the contract of that legal effect will not control. But if, upon the other hand, the intent be clear that title shall not pass until the performance by the vendee of a condition precedent or concurrent, such a contract becomes a conditional sale and not repugnant to any principle of justice or equity, even though possession of the property be given to the opposing purchaser. (Harkness v. Russell, 118 U. S. 663; Rodgers v. Bachman, 109 Cal. 552.) Looking at the terms of this agreement either singly or collectively, it is quite clear that one and all contemplate that there shall be no transfer of title to Langton saving upon the performance by him: 1. Either of the condition precedent, the payment of the moneys, or 2. Upon performance of the condition concurrent, the execution of a mortgage.

\* \* \* \* \*

“It cannot successfully be argued that the circumstance that Langton was to give a mortgage demonstrates the fact that title to the property must have passed to him, because it is clear from the context that the giving of the mortgage and

the passing of the title were interdependent and concurrent. The contract further provides that the title shall remain in the seller until the mortgage be given, or until the purchase price with interest has been fully paid. Unless there be found in the contract some term, clause, or condition nullifying or modifying this clear provision, this language in itself is of controlling force, for it is of the very essence of a contract of conditional sale that the title shall so remain in the seller until compliance with the condition. Again, in case of default the right of recaption is reserved to the seller, but there is *no condition for the sale of the property, and the payment of any surplus over to the purchaser*, a condition which when found is always strongly persuasive that the contract is one of absolute sale with a reserved lien or mortgage back.

\* \* \* \* \*

“The significance which appellants seek to attach to the use of the phrase ‘purchase price’ does not, we think, belong to the language. The declaration is that the title to the property ‘shall remain in the sellers until such mortgage be given, or until the purchase price \* \* \* has been fully paid.’ A sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property. If *there were not in this contract a purchase price, it could not be a sale* either absolute or conditional. ‘Sale is a word of precise legal import. \* \* \* It means at all times a contract between parties to give and to pass rights of property for money which the buyer pays or promises to pay the seller for the thing bought and sold.’ (Williamson v. Berry, 8 How. 495.)



“Nor can appellants’ further contention be sustained, namely, that the fact that Langton’s promise to pay is absolute is determinative and conclusive that the sale itself was absolute. In *Palmer v. Howard*, *supra*, a like circumstance is mentioned but not discussed. In *Rodgers v. Bachman*, *supra*, the same fact is adverted to, but, while such a matter may be a circumstance in determining the nature of the contract, it is a circumstance and nothing more. It never has been held to be a determinative characteristic, and it cannot be so held without undoing all the law upon the question. There can be no sale at all without an agreement, express or implied, to pay. Lacking such a promise, the contract is a mere option. (*Hunt v. Wyman*, 100 Mass. 198.) *If the circumstance that the purchaser’s promise to pay was absolute made the contract an absolute sale, the determination of the nature of such contracts would be so simple a matter as to have rendered entirely superfluous the vast amount of legal research and acumen that have been displayed by all the courts of this country and England in construing them. In truth, the purchaser’s promise is usually an absolute promise.* It was such a promise in *Putnam v. Lamphier*, *supra*; *Parke etc. Co. v. White River etc. Co.*, 101 Cal. 37; *Dunn v. Price*, 112 Cal. 46; *Hervey v. Locomotive Works*, 93 U. S. 664; *Harkness v. Russell*, *supra*; *Preston v. Whitney*, 23 Mich. 260; *The Marina*, 19 Fed. Rep. 760; *Quinn v. Parke etc. Co.*, 5 Wash. 276. Many other cases could be cited where the promise was absolute, and where the sale was held to be conditional, or, if found to be absolute, the finding was never placed upon the ground that the absolute promise determined the question.”

Judgment was accordingly rendered for the plaintiff and the judgment affirmed by the Supreme Court of the state of California.

Here again is a case where the property was in the possession of a *bona fide* holder, and the vendor, under the conditional sales contract, recovered its value.

In *Holt Mfg. Co. v. Collins*, 154 Cal. 265, the eighth syllabus is:

“The *owner* of a threshing machine, who has delivered the possession thereof to another to whom he has contracted to sell it, under an agreement which gave him the right to terminate the contract and retake the property upon default in the payment of the purchase price, *may exercise his right of terminating the contract after the sheriff had taken possession of the machine under a judgment against the purchaser.*”

Again, in the case of *Liver v. Mills*, 155 Cal. 459, the court on page 462 say:

“The validity of conditional sales is fully recognized in this state (*Putnam v. Lamphier*, 36 Cal. 151; *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 597; *Sere v. McGovern*, 65 Cal. 244 (3 Pac. 859); *Lowe v. Woods*, 100 Cal. 408, (38 Am. St. Rep. 301, 34 Pac. 959)), and it is well settled that ‘even *bona fide* purchasers from the person to whom personal property is delivered under an executory contract of sale get no valid claim to the property.’ (*Van Allen v. Francis*, 123 Cal. 474 (56 Pac. 339); *Palmer v. Howard*, 72 Cal. 293 (1 Am. St. Rep. 60, 13 Pac. 858).) The plaintiff did not by his purchase from Thompson and Miller, who were not the owners of the auto-

mobile, but only of a contract enabling them to acquire it upon a compliance with certain conditions, get any rights superior to those held by his grantors.”

Still other cases might be cited, some of which are referred to on page 21 of counsel’s brief; but we respectfully urge and ask the court for its earnest consideration of these cases to the effect that they are decisive of the case at bar in the maintenance of the rights of the plaintiff in the personal property in dispute.

The fact that some of the things referred to in the cases above were not for sale or consumption can have no legal effect upon the situation, because the rights of the legal owner of the goods are maintained in all of the California cases, regardless of that question.

It will be noted that in one of the cases the contract is “*valid in the absence of fraud.*” Fraud is neither alleged by counsel nor attempted to be proved. We urge for the earnest consideration of the court upon the rehearing of this case, the good faith of the parties herein throughout the entire controversy.

We respectfully refer the court to *Bierce v. Hutchins*, 205 U. S. 304.

In that case the question was raised as to whether the contract was one of conditional sale or one in which title passed. On page 347 the court say:

“With the development of its effects there has been some reaction against the Benthamite doc-

trine of absolute freedom of contract. But courts are not legislatures and are not at liberty to invent and apply specific regulation according to their notions of convenience. In the absence of a statute their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose.

“That contract says in terms that it is conditional and that the goods are to remain the property of the seller until payment of the note given for the price. *This stipulation was perfectly lawful.* Harkness v. Russel, 118 U. S. 663. So that the only question is whether any other provision of the contract is inconsistent with this one and qualifies and explains it as intended to do less than it purports to do when taken alone. Chicago Railway Equipment Co. v. Merchants National Bank, 136 U. S. 268. The fact that possession was to be and was delivered, and that it must have been contemplated that the rails would be put down upon a roadway no doubt assumed, it seems, wrongly, to belong to the Kona Company, had no such effect, as between vendor and vendee. Neither did the requirement of additional security in the form of first mortgage bonds of the company. It may have been expected that the mortgage would embrace a part or the whole of this property, but there is nothing more common than a provision in a mortgage that it shall apply to and embrace future acquired property, with sufficient description to ascertain the same and bring it within the mortgage when acquired. And if the mortgage would have been operative at once, by way of estoppel in favor



of three persons, there was the more reason for exacting an interest under it to save the vendor's rights in that event. Of course, *the absolute liability for a price*, and putting that liability in the form of a note, *are consistent with the retention of title until the note is paid*. Parties can agree to pay the value of goods upon what consideration they please (*White v. Solomon*, 164 Mass. 516), and when a purchaser has possession and the right to gain the title by payment, it cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does."

The fourth syllabus is:

"*The absolute liability for the price* and putting that liability in the form of a note are consistent with the retention of title until the note is paid; and, in the absence of statute, a stipulation that the sale is conditional and the goods remain the property of the seller, until payment of a note given for the price, is lawful and enforceable in replevin even where, as in this case, possession was given and conditional security of mortgage bonds was required."

### III.

This Honorable Court having held that "*as between the parties to this contract*, we are unable to make anything more of it than what it purported, namely, a mere *consignment* of the goods to the W. D. Newerf Rubber Company for sale upon the terms and conditions therein stated," it must be held, in view of the foregoing decisions, that *the contract is valid as against creditors likewise*, unless, as held by this Honorable

Court in *General Electric Company v. Brower*, 221 Fed. 597, "the circumstances *outside* of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale."

There was no attempt made by the trustee in the case at bar to go outside the contract to show any fraudulent circumstances surrounding or controlling the situation, and the case falls squarely within the words of the United States Supreme Court in the case of *Ludvigh v. American Woolen Company*, wherein Justice Day says:

"It therefore follows that, if there are no other circumstances controlling the situation and establishing that this contract was a mere cover for a fraudulent or illegal purpose, *there is nothing in its terms* operating to transfer the title to the goods to the Niagara Company, or to prevent the return of those unsold to the Woolen Company, or their being retaken by that company upon the happening of the contingency shown in this case."

Construing section 47a of the Bankruptcy Act, giving the trustee in bankruptcy the right of an execution creditor, we are still placed in exactly the position *Vermont Marble Co. v. Brow*, *supra*, for if the execution creditor cannot recover, then we urge that the trustee in bankruptcy cannot recover.

Further, we ask the court for earnest consideration of the question: What difference would there be in the rights of an execution creditor as to a stock of goods on hand for sale, whether said stock was held

under an *agency* contract, a *consignment* contract, or a *contract* of conditional sale, when, as in this case, and as in a number of other cases of like character, said *execution creditor knew absolutely nothing about the character of the contract or the legal status of the parties in relation thereto*. All of the decisions of the state of California and of the United States courts, including this Honorable Court (especially in *General Electric Co. v. Brower*), hold that if the stock of goods is held by the bankrupt under an *agency* contract, that *the validity thereof cannot be questioned by an execution creditor or a trustee in bankruptcy*. We urge, therefore, that the same rule applied by this Honorable Court to agency contracts must be applied to a consignment contract, or a conditional sales contract (assuming the 1911 contract to be either), unless circumstances outside the contract show a fraudulent concealment by which creditors are defrauded,—and no such showing is even attempted.

Further upon the question of fraud: *If this contract is a fraud upon creditors in and of itself, the same rule would be applied to an agency contract, to-wit: the contract of 1914; the same rule would have been applied to all of the California cases above cited*. Since the persons attempting to purchase the property had no knowledge of the rights of the owner, the Supreme Court in the case of *Vermont Marble Company v. Brow*, *supra*, held that any “impolicy in allowing a severance of title and possession where an ultimate sale is designed by the parties, is for the consideration of the legislature and not the courts.” *The legislature of the*

*state of California has not seen fit to pass a statute upon the subject.*

Further upon the question of fraud: If the contract of 1911 in the case at bar is in and of itself, as held by this Honorable Court, a fraud upon creditors, would not the same rule apply to all of the cases of the United States courts cited by us, whether it be an *agency* contract, or *consignment* contract, or *conditional sales* contract.

Further upon the question of fraud: We respectfully refer to the court for its earnest consideration the case of *Bryant v. Swofford*, 214 U. S. 279, 22 Am. B. R. 111, wherein it says:

“There is nothing in the nature of this contract which would forbid the parties from entering into it if it is valid by the laws of the state where made, but in bankruptcy the construction and validity of such a contract must be determined by the local laws of the state.”

*We urge that there is nothing inherently wrong in a contract of the nature of the one under consideration, especially when we consider the many decisions of the Supreme Court of California, and of the federal courts, including the Supreme Court of the United States, holding them valid.*

The court will notice that in *Bryant v. Swofford*, *supra*, that this was a stock of goods to be sold “*in the ordinary course of business*, but not otherwise.” It is true that the proceeds of the sale belonged to the vendor, but we cannot comprehend how that question



makes it a fraud upon creditors, or how that question is involved in the case.

Further upon the question of fraud: It is *neither* an *issue* in the case, *nor is there any claim made by the trustee of there being any evidence in the case, that creditors relied upon this stock of goods*, either under the agency contract of 1914 or the contract of 1911, which we urge is also an agency contract.

In this connection we respectfully refer the court to:

Ludvigh v. American Woolen Co., 231 U. S.  
522, 31 Am. B. R. 481.

On page 487 the court say:

“It is not shown that any creditor relied upon mismarking or misbranding.”

McElwain v. Bassett, 36 Am. B. R. 536 (May,  
1916).

In this latter case the court on page 539 say:

“There is no evidence in the record that any creditor of Adkins was misled in any way by the course of dealings between the appellant and Adkins.”

*If the fact that a stock of goods in the place of business for sale would entitle a person dealing with the bankrupt to rely upon its being his property, then we further and again suggest that the rule would be applicable to all of the California cases cited herein, and all of the federal cases cited, as well as the decision of this Honorable Court in General Electric Company v. Brower, 221 Fed. 597.*

*In re A. A. Thomas*, 36 Am. B. R. 600 (May, 1916),  
the first syllabus is:

“In order to determine whether a contract is one of agency or consignment or whether it is one of conditional sale, it is always necessary to consider all the terms of the contract, so as to ascertain the intention of the parties. If it is intended and provided that the customer should be absolutely bound in all events to pay for the goods, the title being reserved in the vendor, then the contract is one of conditional sale. But if the vendor merely delivers the goods to the customer for sale by him as the agent of the vendor, the customer not being absolutely bound by the contract to pay for the goods, then the contract is one of consignment for sale or an agency to sell—it is a mere bailment.”

The second syllabus is:

“The conduct of the parties to a contract and the construction put on same by them is entitled to consideration.”

The third syllabus is:

“Provisions of a contract examined and HELD to constitute a *consignment* and *not* a conditional sale.”

*McElwain v. Bassett*, *supra*, the syllabus is:

“Provisions of an agreement whereby property was shipped to an alleged bankrupt for sale on commission examined and HELD not to constitute an absolute sale, nor a conditional sale, but a contract of factorage valid under the laws of Kansas, although not recorded, and that such property may be reclaimed from the trustee in bankruptcy.

*"The fact that the parties to the contract conducted the business in relation thereto in an irregular manner, so long as no creditor of the alleged bankrupt was misled to his injury thereby, did not avoid the contract."*

#### IV.

##### **Intention of the Parties.**

*There being no issue of fraud in the case at bar, and no attempt by the trustee to show "other circumstances controlling the situation," the intention of the parties to the contract should control its proper interpretation.*

Topliff v. Topliff, 122 U. S. 121.

The first syllabus is:

"When the language of a contract is ambiguous, the practical interpretation of it by the parties is entitled to great, if not controlling influence."

District of Columbia v. Gallaher, 124 U. S. 505.

The syllabus is:

"The practical construction which the parties put upon the terms of their own contract, and according to which the work thereunder was done, should prevail over the literal meaning of the contract, where one thereto seeks to obtain a deduction in the contract price in accordance with such literal meaning."

We urge consideration of the last four cases upon the question of the intention of the parties as being equally controlling with the law of the state. We have referred to the Transcript of Record, page 26, wherein the bankrupt himself stated that

“the sales were made from the consigned stock of The Miller Rubber Company,”

and further, in *Metropolitan National Bank v. Benedict*, 74 Fed. 182 (C. C. A.), the court say:

“Moreover, parties have the undoubted right to make their own contracts, and to put their own construction upon them, and to regulate their rights and liabilities thereunder. If the court ‘leaves the parties to be governed by their understanding of their language, it, in effect, enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice.’ *St. Louis Gas Light Co. v. City of St. Louis*, 46 Mo. 128; *Mathews v. Danahy*, 26 Mo. App. 660. And when both parties to a contract, acting in good faith, are agreed as to its meaning, and their rights under it, a stranger, having no interest in the subject-matter of the contract, cannot insist that a different interpretation shall be put upon it, or compel the parties to put that interpretation upon it which would benefit him.”

We especially refer the court to the facts in this case, *it being a consignment of clothing for sale*. Here, therefore, we have another case of a consignment of goods for sale, and the Circuit Court of Appeals held that the contract was *not* a sale but a *contract of factorage* which passed *no* title.

We urge that by the clear intention of the parties, title in all of these goods was reserved, with the right to retake the same as to the unsold goods, and that upon giving due consideration to the points and authorities suggested above we urge that this Honorable



Court erred in holding that said contract is, in and of itself, a fraud upon creditors for the reasons and upon the grounds stated.

V.

The 1911 contract was abrogated by the contract between the parties, dated June 11th, 1914, and all property in the possession of the bankrupt on July 1st, 1914, is governed by the provisions of the latter contract.

The special master found that "*The Miller Rubber Company of California was organized for the purpose of acting as agent in handling and selling the goods of The Miller Rubber Company of Ohio \* \* \** and while it does appear from the evidence that the officers of the two corporations are the same \* \* \* it is owned and controlled by the stockholders of The Miller Rubber Company of Ohio."

After the appointment of The Miller Rubber Company of California as the agent of The Miller Rubber Company of Ohio, and while the 1911 contract was still in force, the bankrupt and The Miller Rubber Company of Ohio, through The Miller Rubber Company of California, its agent, entered into the 1914 contract, the last paragraph of which expressly provides:

"This contract and supplement shall supersede all contracts, agreements or understandings of any nature now existent between The Miller Rubber Company or The Miller Rubber Company of California and W. D. Newerf Rubber Company or W. D. Newerf, and such contracts, agreements and understandings shall be and are considered null and void, except as to the unpaid accounts."

We respectfully urge for the earnest consideration of the court the fact that this contract took effect about July 1st, 1914, *about nine months preceding the bankruptcy proceedings herein*. How may it be said that as to creditors of the bankrupt title to the goods shipped under the 1911 contract *passed* to the bankrupt when it must be conceded that the contract of 1914 wholly superseded the contract of 1911. We earnestly ask the court: What was the status of the title to these goods between July 1st, 1914, and March 20th, 1915 (the date of the proceedings in bankruptcy)? We do not comprehend how title to these goods passed to the bankrupt under the 1911 contract “as a fraud upon creditors” when *there were no legal relations arose as between the bankrupt and his creditors, and the petitioners herein, while said contract of 1911 was in effect*. Now, that being conceded to be true, leaving due consideration for the intention of the parties in the interpretation of their contract, we urge that all property on hand, or shipped after July 1st, 1914, was necessarily held by the bankrupt on *consignment* under the 1914 contract.

We respectfully urge that the decision of this Honorable Court in this case, upon the right to recover the personal property now on hand, is contrary to the long line of decisions of the United States courts, including this Honorable Court, and contrary to the decisions of the Supreme Court of California upon the same subject.

## VI.

We, therefore, respectfully urge the following points for reconsideration of this court upon the rehearing thereof:

FIRST: The validity of the contracts in question must be governed by the law of the state of California. Under the law as established by the Supreme Court of California, a consignment contract, good as between the parties thereto, is good as against an execution creditor in the absence of proof of circumstances outside the contract showing a fraudulent concealment to the injury of creditors. Such is the law announced by this court in former decisions, as well as by the United States Supreme Court in *Ludvig v. American Woolen Co.*

SECOND: The 1911 contract, being as between the parties, a valid consignment contract, is good as against the trustee in bankruptcy, no issue of fraud having been raised, and no attempt having been made to go beyond the terms of the contract.

THIRD: The 1911 contract was abrogated by agreement between the parties, and the ownership of all goods in the hands of the bankrupt on July 1st, 1914, must be governed by the contract of June 11, 1914.

Wherefore, your petitioners pray that they may be granted a rehearing upon oral argument upon this most important subject; and that upon said rehearing said decision may be reversed and judgment rendered for your petitioners.

Respectfully submitted,

THE MILLER RUBBER COMPANY.

THE MILLER RUBBER COMPANY OF CALIFORNIA.

By BICKSLER, SMITH & PARKE,

*Their Attorneys.*

**Certificate of Good Faith.**

We, the undersigned, as counsel for The Miller Rubber Company and The Miller Rubber Company of California, petitioners herein, present and file herewith a petition for a rehearing of this case.

We, and each of us, do hereby certify that the foregoing petition is filed in good faith in the full belief and opinion that the case of the petitioners is a meritorious one, and should be reconsidered by this Honorable Court.

And we further certify that this petition for a rehearing is not filed for purposes of delay.

W. SCOTT BICKSLER,

W. C. SMITH,

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*Attorneys for The Miller Rubber Company and The  
Miller Rubber Company of California.*





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD AND  
NAVIGATION COMPANY, a Corporation,  
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO,  
by His Guardian *ad Litem*, LEON BEN-  
EZRA,  
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District  
Court of the Western District of Washington,  
Southern Division.

Filed

FEB 15 1908

F. D. Anderson,  
Clerk.



United States  
Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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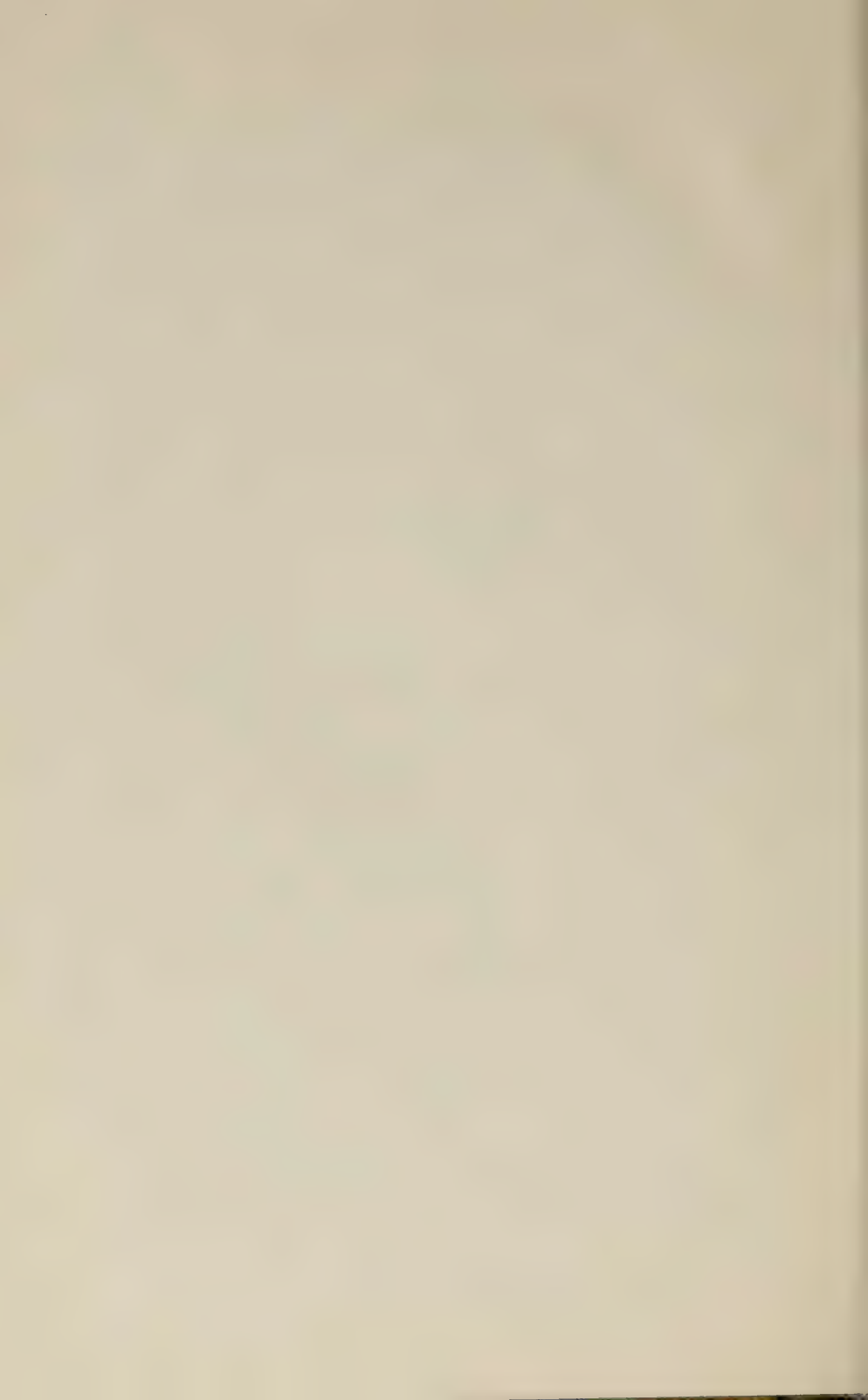
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[1\*]

\*Page-number appearing at foot of page of original certified Record.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 1585.

OREGON-WASHINGTON RAILROAD & NAVI-  
GATION COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

ESTHER ROMI PENSO and BENSOIR PENSO,  
by His Guardian *ad Litem* LEON BEN-  
EZRA,

Defendants in Error.

**Praeipice for Transcript.**

To the Clerk of the United States District Court for  
the Western District of Washington, Southern  
Division:

You will please prepare copies of the following  
papers to constitute transcript on writ of error in  
the above-entitled cause, the caption (excepting on  
the complaint), all endorsements, verifications and  
acceptances of service, etc., to be omitted. Tran-  
script to be printed according to the Circuit Court  
of Appeals rules:

Amended complaint.

Answer of defendant.

Reply to answer.

Motions for directed verdict.

Verdict.

Judgment.

Bill of exceptions.

Order settling bill of exceptions.

Order allowing writ of error.

Assignment of errors.

Cost and supersedeas bond, with approval of the court thereon.

Stipulation as to exhibits.

Order directing the original exhibits to be transmitted.

Stipulation relating to transcript.

Admission of service of order allowing writ of error, etc.

You will also transmit with the original citation and other papers which are required to be transmitted the original acceptance of service of writ of citation upon the defendants in error.

This praecipe.

J. B. BRIDGES,

BRIDGES & BRUNNER,

SULLIVAN & CHRISTIAN,

Attorneys for Plaintiff in Error.

(Filed Jan. 12, 1916.) [2]



*In the United States District Court, for the Western  
District of Washington, Southern Division.*

No. 1585.

ESTHER ROMI PENSO and BENSIOR PENSO,  
by His Guardian *ad Litem*, LEON BEN-  
EZRA,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILWAY & NAVI-  
GATION COMPANY, a Corporation,  
Defendant.

**Second Amended Complaint.**

Comes now the above-named plaintiff, Esther Romi Penso for herself, and Bensior Penso, by his guardian *ad litem*, Leon Benezra, and complaining of the above-named defendant, Oregon-Washington Railway & Navigation Co., a corporation, alleges as follows:

I.

That on the 11th day of April, 1914, Bensior Penso was a minor of the age of eleven years; that Leon Benezra is the duly appointed, qualified and acting guardian *ad litem* of the said person and estate of Bensior Jenso, a minor, having been appointed such guardian *ad litem* on the 11th day of April, 1914, and as such guardian *ad litem* has been duly authorized to prosecute this action for and on behalf of said minor.

2.

That the said plaintiff, Esther Romi Penso, was

the wife of the said Haim Jack Penso, and that the plaintiff, Bensior Penso, a minor appearing by his guardian *ad litem*, Leon Benezra, is the son of the said Haim Jack Penso, deceased.

3. [3]

That the defendant, Oregon-Washington Railway & Navigation Company, is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and engaged in the operation of a line of railway in the State of Washington, and particularly in Chehalis County and at Hoquiam, in said State.

4.

That on or about the 4th day of November, 1913, at about the hour of six o'clock in the evening, the said Haim Jack Penso was returning from his place of occupation in East Hoquiam to his boarding-house in West Hoquiam; That in so doing, it was his custom and that of his fellow workmen to cross the Hoquiam River from East Hoquiam to West Hoquiam over the bridge of the Northern Pacific Railway Company, and said bridge was used for a common passageway by the said Penso and many other persons, with the knowledge and consent of the Northern Pacific Railway Company and of the defendant; that such practice had been continued for some years and was at the invitation of the defendant and the said Northern Pacific Railway Company, which invitation, practice and custom was well known to the defendant, its agents, officers and employees.

## 5.

That on the night in question, the said Haim Jack Penso, following the said custom and accepting the said invitation was in the act of crossing said bridge, as aforesaid, and had reached a point somewhere near the middle of said bridge when a certain passenger car, propelled by gasoline engines, and known as a gasoline motor car, owned and operated by the defendant, approached said bridge and [4] the point where the said Haim Jack Penso was crossing said bridge, at a high and unusual rate of speed, and was carelessly and negligently driven upon the said *Haim* Jack Penso in such a careless and negligent manner that the said Haim Jack Penso was knocked from the bridge into the waters of the Hoquiam River and was either killed by the striking of the car or drowned as a result of being knocked from said bridge. That as before alleged, the car was negligently and carelessly driven and at a high rate of speed, that the said Haim Jack Penso was in plain view for a considerable period of time before he was struck by said car. That he sought, by every means in his power, to escape from said car, but that said car was carelessly and negligently driven upon him and no effort or attempt was made upon the part of the engineer or motorman of said car to slacken the speed of the same, or in any manner attempt to prevent said car from striking the said Penso. That the said *Hami* Jack Penso, was in plain view of the employees of the defendant operating and driving said car, and particularly the engineer or motorman, of the car, for a distance of four hundred feet from

the point where he was struck, and his efforts to escape were, or could have been, plainly seen by the said engineer or motorman, but that as before alleged, said engineer or motorman carelessly and negligently drove said car upon him and caused his death.

6.

That said Haim Jack Penso was an able-bodied man of the age of — years, capable of earning two and 50/100 dollars (\$2.50) per day. [5]

7.

That as before alleged, the said Haim Jack Penso was the husband and father, respectively, of the plaintiffs, that by reason of the foregoing facts they have been deprived of the financial support afforded them by the said Haim Jack Penso, and of nurture and of the intellectual, moral and physical training which only a parent can give to his children, and have further been deprived of a prudent, kind and affectionate husband and father, which was material to their comfort and valuable as counsel to the wife and children of said deceased whereby they have been injured in the sum of Twenty Thousand Dollars (\$20,000).

WHEREFORE, The plaintiffs pray for damages against the defendant in the sum of Twenty Thousand Dollars (\$20,000), for their costs and disbursements in this action, and for such other and further



relief as to the Court may seem just.

MORGAN & BREWER,  
Attorneys for Plaintiff.

(Verification.)

(Filed July 31, 1914.) [6]

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### **Answer to Second Amended Complaint.**

The Oregon-Washington Railroad & Navigation Company, defendant, answers the second amended complaint herein, as follows:

#### **I.**

Answering the allegations contained in paragraph 1, it says that it has no knowledge or information sufficient concerning the truth of the matters and things therein set out, to form a belief, wherefore it denies each and every allegation in said paragraph.

#### **II.**

Answering paragraph 2, it says that it has not knowledge or information sufficient to form a belief as to the truth of the matters and things contained in paragraph 2, of the said complaint, wherefore it denies each and every of said allegations.

#### **III.**

Answering that part of paragraph 4, which alleges that on or about the date and time therein mentioned the person therein mentioned was returning from his place of business to his boarding-house, and that in so doing it was his custom and that of his fellow workmen, to cross the Hoquiam River as in said paragraph set out, it says that it has not knowledge or information sufficient to form a belief as to the

truth thereof, wherefore it denies the same, and it denies that the said bridge was used for a common passageway by the said Penso and others, *and denies that the said bridge was used as a common passageway by the said Penso and others*, with the knowledge and consent of the said defendant, and denies that the practice of the said Penso and others to use the said bridge as in said paragraph [7] set out, had continued for some years, and denies that the said Penso or others crossed upon the said bridge at the invitation of the said defendant or the said Northern Pacific Railway Company, and denies that the said defendant had knowledge of the custom and practice, as alleged in said paragraph.

## IV.

Denies each and every allegation contained in paragraph 5.

## V.

It says that it has not knowledge or information sufficient to form a belief as to the truth of the matters and things set out in paragraph 6, wherefore it denies each and every allegation in said paragraph contained.

## VI.

It denies each and every allegation contained in paragraph 7, and particularly denies that the said plaintiffs have been damaged or injured in the sum of \$20,000 or in any other sum whatsoever.

And further answering unto the said amended complaint and by way of a first affirmative answer, the defendant alleges.

## 1.

That it has complied with all the laws of the State of Washington with reference to foreign corporations, and has seasonably paid its license fees to the State of Washington.

## 2.

That at all of the times mentioned in the complaint the defendant had certain arrangements with the Northern Pacific Railway Company for the use of the latter's bridge across the Hoquiam River; that at all said times the said bridge was strictly a railroad bridge and was in no respects constructed or provided for the use thereof by persons walking, and that during all of [8] such times all persons were strictly prohibited from using the said bridge by walking over or across the same, and that if on the occasion mentioned in the complaint herein, the said Penso did walk upon, over and across the said bridge, he did same with full knowledge that such bridge was only a railroad bridge and was not constructed for or intended to be used by persons walking, and that all persons were forbidden and prohibited to go upon or walk across the said bridge, and that during all such times the said Penso well knew that the said bridge was constantly used by the said railroads and other railroads, in taking cars and trains across the same, and well knew that a railroad train or engine might cross upon the said bridge at almost any time of the day or night, and well knew and appreciated the great dangers incident to undertaking to walk across the said bridge, and knew and appreciated that it was dangerous for persons to walk across said

bridge at any time during the day or night, and defendant alleges that if the said Penso did at or about the time in said complaint mentioned, undertake to walk across the said bridge, he did so with full knowledge that the said bridge was not a foot bridge, and with full knowledge that it was exceedingly dangerous for him so to do, and with full appreciation of all the dangers incident to walking across the said bridge, and that if he went upon and undertook to walk across the said bridge as set out in the complaint, he thereby assumed all of the risks and dangers incident to so doing, and if he was injured while walking across the said bridge or while being thereupon, he should not be permitted to have any recovery herein, because of his knowledge of the dangers and his assumption of all such dangers and risks.

And the said defendant further answering the said complaint [9] and by way of a second affirmative defense, alleges:

1.

It alleges each and every allegation contained in paragraph I, of the first affirmative defense herein.

2.

That at all of the times mentioned in the complaint, the bridge across the Hoquiam River and hereinbefore mentioned, was intended to be used only for the carrying of trains and cars upon the same and over and across the said Hoquiam River, and that said bridge was not in anywise provided or construed for foot travellers, and that during all the times mentioned in the complaint and for a long time prior



thereto, the said Penso had full knowledge that the said bridge was not constructed for or intended to be used by persons walking across the same, and knew that all persons were forbidden to walk upon or across the said bridge, and knew the said bridge was used extensively for taking trains across the same, and knew that trains were liable to cross the same at any time of day or night, and particularly knew that the defendant's gasoline car mentioned in the complaint; was scheduled to leave Hoquiam for Montesano, so as to cross the said bridge at the time it is alleged in the complaint the said Penso was injured on the said bridge; that at approximately the time mentioned in the complaint, the said gasoline car, on its regular trip aforesaid, reached the said bridge and approached and went upon the westerly end thereof, very slowly, and that at said time the said car had burning a very strong headlight, which could have been seen by any person undertaking to cross the said bridge, long before he would get upon the said bridge or in a place of danger, and that at the said time it was very dark and windy and raining. [10]

## 3.

That if at the time mentioned in the complaint, the said Penso undertook to cross the said bridge, he was negligent in so doing and his negligence materially contributed to his injury, if he were injured, in the following manner, to wit: That the said Penso was negligent in going upon the said bridge for the purpose of crossing the same or otherwise, for the reason that the said bridge was not prepared for nor used

by persons travelling afoot, and he was further negligent in going upon the said bridge, for the reason that he knew that trains were liable to cross the said bridge at any time, and particularly knew that defendant's gas car was due on its regular trip, to cross the said bridge from the west, at the time alleged in the complaint; that if the said Penso did at the time aforesaid, undertake to cross over the said bridge, he was further negligent in not observing the headlight and the approach of the said car and getting out of the way of danger by coming in contact with the said car, and that if he was injured, his injury was the result of his own negligence in getting or jumping in front of the said car as it was moving along, and in failing, upon seeing or hearing the approach of the said car, to get out of the way and avoid danger of being run into by such car, and if the said Penso was injured at or about the time set out in the complaint, his injury was *duly* solely to his own fault and his own carelessness and without any fault or carelessness upon the part of the defendant or its employees.

WHEREFORE the defendant prays that the plaintiffs take nothing by their action and that defendant may go hence without day and recover its proper costs and disbursements herein.

BRIDGES & BRUENER,

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Defendant.

(Verification.)

(Filed Sept. 18, 1914.) [11]

**Reply.**

Comes now the plaintiff, and for reply to the first affirmative answer and defense of the defendant, and for reply to the second answer and defense, denies each and every allegation therein contained.

MORGAN AND BREWER,  
Attorneys for Plaintiff.

(Verification.)

(Filed Sept. 19, 1914. [12])

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**Motion (For a Directed Verdict).**

The evidence being in and both parties having rested, the defendant now moves the Court to instruct the jury to return a verdict against the plaintiff Esther Romi Penso, on the ground that the evidence is insufficient to submit the case to the jury.

BRIDGES & BRUENER,

SULLIVAN & CHRISTIAN,  
Attorneys for Defendant.

(Filed Oct. 27, 1915.) [13]

**Motion (For a Directed Verdict).**

The evidence being in and both parties having rested, the defendant now moves the Court to instruct the jury to return a verdict against the plaintiff Bensior Penso, on the ground that the evidence is insufficient to submit the case to the jury.

BRIDGES & BREUNER,  
SULLIVAN & CHRISTIAN,  
Attorneys for Defendant.

(Filed Oct. 27, 1915.) [14]

**Verdict.**

We, the jury empanelled in the above-entitled cause, find for the plaintiffs and assess their damages at the sum of Twenty-five Hundred Dollars (\$2,500).

MEYER JACOB,  
Foreman.

(Filed Oct. 28, 1915.) [15]

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**Judgment.**

This cause having come on to be heard upon the issues of fact, before the above-entitled court, and a jury, at Tacoma, Washington, on the 26th day of October, A. D. 1915, and evidence on behalf of the plaintiffs and defendant having been heard, and the cause having been submitted to a jury, and the jury having heretofore returned a verdict in favor of the plaintiffs, and against the defendant, in the sum of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500), now, therefore,

IT IS ORDERED, ADJUDGED, and DECREED: That the plaintiffs do have and recover of and from the defendant, the sum of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500), with their costs to be taxed at the sum of \$175.80 Dollars:

Dated this 1st day of Nov. A. D. 1915.

EDWARD E. CUSHMAN,  
Judge.

(Filed Nov. 1, 1915.) [16]



**Bill of Exceptions.**

Be it remembered that heretofore on the 26th day of October, 1915, the above cause came on for trial before the Honorable Edward E. Cushman, Judge, and a jury, Morgan & Brewer and A. E. Cross appearing as attorneys and counsel for plaintiff, and J. B. Bridges, Sullivan & Christian, and Bogle, Graves, Merritt & Bogle, appearing as attorneys and counsel for defendant, whereupon the following proceedings were had and testimony taken, to wit:

Plaintiff offered in evidence a certified copy of the plat of Hoquiam Tide and Shore Lands and the dedication thereof as made by the Commissioner of Public Lands of the State of Washington, showing the dedication of June 10, 1895, for the purpose, as counsel stated, of showing the nature of the street over which the railroad ran and upon which the bridge mentioned in the pleadings was located.

Defendant's counsel objected to the introduction of this in evidence on the ground that the same was immaterial and that it made no difference whether the bridge was a prolongation of the street or not.

[17]

The Court overruled the objection. To which ruling of the Court the defendant excepted, and the exception was allowed. The paper was admitted in evidence, marked Plaintiff's Exhibit 1.

Plaintiff's counsel then offered in evidence a certified copy of the rededication of the same lands by the same office, being Plat 2, Hoquiam Tide and

Shore Lands, filed on the 21st day of July, 1913, and purporting to show the railroad bridge in question. Counsel stated that this was offered in evidence to show the present status.

To the introduction of this in evidence defendant's counsel objected, upon the same ground as that made to the previous offer; that it was immaterial.

The Court overruled the objection. To which ruling of the Court defendant excepted and the exception was allowed. The paper was admitted in evidence, marked Plaintiff's Exhibit 2.

Counsel for plaintiff then offered in evidence Ordinance No. 70 of the city of Hoquiam, an ordinance granting a franchise to the railway company to operate over this street, which appeared upon its face to have been granted to Harry C. Heermans; the copy being under the seal of the city and the clerk of the city of Hoquiam. Counsel stating that it was offered for the purpose of showing the public nature of the highway or street over which the railway ran, and that plaintiffs would connect the ordinance up with the railway company by showing the transfer to the Northern Pacific.

To which counsel for defendant objected upon the ground that the same was immaterial; stating that the injury, if it occurred at all, occurred on the bridge which spans the Hoquiam River and that it would be wholly immaterial that the [18] railroad company had a right to operate on the street on one side or the other, or both sides of the bridge.

The Court overruled the objection. To which ruling of the Court the defendant excepted and the

exception was allowed. The paper was admitted in evidence, marked Plaintiff's Exhibit 3.

Counsel for plaintiff offered in evidence the proceedings of the city council of the city of Hoquiam, under the seal of the city, and certified by the clerk, showing the transfer of the ordinance last referred to to the Northern Pacific Railway Company and stated that this was defendant's authority for building a bridge where the bridge was then built, showing a transfer from Mr. Heermans to it.

To this counsel for defendant objected on the ground that it was immaterial. The Court overruled the objection. To which ruling of the Court defendant excepted and the exception was allowed. The paper was admitted in evidence, marked Plaintiff's Exhibit 4.

**Testimony of Leon Benezra, for Plaintiff.**

LEON BENEZRA, a witness on behalf of plaintiff, testified as follows:

That he was then living at Seattle, Washington, and had been living there for a year past. That he formerly lived at Hoquiam about four and a half years. That he knew the deceased, Haim Jack Penso, during his lifetime; that the deceased was always his chum; that witness did all of his work with him; and that they lived together at the same place and associated together. That he first became acquainted with the deceased in 1910 in Hoquiam. That he knew deceased's [19] brother and when he went to Hoquiam he met deceased there and this was the way he became acquainted with the de-

(Testimony of Leon Benezra.)

ceased. That he knew the deceased's brother in Europe, and became acquainted with the deceased in 1910. That at that time the deceased worked at the National Lumber Company carrying slabs for the fire at the fire-box. That he worked there over two years, then he quit and worked somewhere in Aberdeen, he did not know where, and then deceased came back to the Coats Shingle Co. and worked about fourteen or sixteen months carrying blocks to the sawyers. That the deceased and witness lived in the same house—503 6th street, on the east side of the Hoquiam River. That they lived there about fifteen or sixteen months, something like that. That the Coats Shingle Co. was at the foot of Ontario street on the opposite side of the Hoquiam River from where they lived. That it took fifteen or twenty minutes to walk from the bridge referred to the Coats Shingle Co. Four months before Penso was killed the witness left Hoquiam for Seattle. That when Penso was killed witness was going to San Francisco by water. Witness left Seattle November 1st and November 4th Penso was killed and after fifteen days he wired to Penso's brother, whom he knew in Europe. That he became acquainted with Penso's brother when he was in Greece working for the Turkish Consulate at Patras. That he also met Penso's brother in the United States. That he was the same nationality as witness.

That he became acquainted with the deceased at Hoquiam in 1910, through correspondence. That



(Testimony of Leon Benezra.)

he was the guardian *ad litem* of the child in this action, and was the Leon Benezra mentioned in the complaint as the guardian *ad litem* of Bensoir Penso.

[20]

That he was not personally acquainted with the family of the deceased. That he had had correspondence with the plaintiff, Romi Penso, prior to the death of the decedent.

Then witness was asked the following question by plaintiff's counsel: "At whose request did you correspond with her?"

To this question defendant's counsel objected as incompetent, immaterial and irrelevant. The objection was overruled by the Court. Defendant excepted and the exception was allowed. Witness answered that he wrote to Romi Penso when her husband was killed.

Witness then further testified that during the lifetime of the deceased, and at his request, witness wrote to a person calling herself Esther Romi Penso. That he used to write to her once a month, sometimes twice a month, at deceased's request. That witness received letters from Romi Penso. That he used to have an answer for almost every letter. That this continued during all the time he was living at Hoquiam—4½ years. That *he* letters which he wrote to Romi Penso were directed to different addresses. Sometimes to her mother's and sometimes to her uncle's address, at Dardanelles, Turkey. That the deceased was a Turkish subject of Jewish nationality.

**Testimony of Chelbom Ameri, for Plaintiff.**

CHELBOM AMERI, a witness for plaintiff, testified as follows:

That he knew Haim Penso, deceased, during his lifetime. That he had known him since he was a boy. He was his cousin. Knew him at Dardanelles, Turkey. That he knew deceased's wife and his boy. That he had known deceased's boy since he was born. That he lived just two houses away from him. He [21] was his neighbor. That he knew Haim Penso and Esther Romi Penso were married. He was there when they were married. That they were married fourteen years ago. The boy age twelve years, deceased age 39 years, witness age 31 years, age of wife of deceased 35 years. That witness had known Penso since witness was born. That he lived by deceased about 19 years in Turkey, at Dardanelles. That he did not know when deceased came to this country. That he saw him after deceased came here. That witness came to this country first—11 years ago. That he thought the deceased had been in the United States five or six years. That witness was a laboring man. That deceased worked for a living in a sawmill at Hoquiam. That he never had any letters from the family of the deceased. That witness did not have any other relations in this country. That he now lived back in New York. That he saw the deceased last about two years before his death, at Seattle.

That back in Turkey the deceased and Esther Romi

(Testimony of Chelbom Ameri.)

lived together as husband and wife. That deceased was a laboring man in the old country. Did pick and shovel work and other work like that.

That witness never got any letters from Mrs. Penso or from the boy.

That deceased and Mrs. Penso were married at Dardenelles, Turkey. That they had a man marry them—a churchman. That they were married in the Jewish religion, at deceased's house. That he did not know what month they were married in. That after they were married they lived together and among their friends and acquaintances were known as man and wife and went from place to place as man and wife. They told people they were husband and wife and everybody knew they were husband and wife. [22]

On cross-examination by defendant's counsel witness testified that he had lived at Seattle five years, never lived at Hoquiam. That Penso had been in this country five or six years before his death.

That witness had never been back to Turkey or the old country since coming to this *county*. That deceased never went back to Turkey after he came to this country.

**[Testimony of Leon Benezra, Recalled, for Plaintiff.]**

LEON BENEZRA being recalled as witness for plaintiff testified as follows:

That he had written to Esther Romi Penso about every month and sometimes twice a month. That he

(Testimony of Leon Benezra.)

usually sent every month money to her. He sent this money in deceased's name. That witness made the applications. That deceased sometimes sent to Esther Romi Penso twenty-five dollars, sometimes thirty dollars, sometimes fifty dollars, sometimes fifteen dollars per month. That this money was sent by money order, postoffice or bank draft. Once \$50 was sent her through a man who lived at Hoquiam whom deceased knew. That deceased sent this money throughout a period of four years or something like that. That deceased sent her altogether nearly two thousand dollars in four years. Might be more, witness could not state exactly.

That witness had received no letters from Mrs. Penso since Penso's death. She sent her letters to Penso's brother, in New York.

That at one time he was connected with the Turkish Consulate in Greece. That deceased was of Turkish nationality. That he never became a citizen of the United States. That Mrs. Penso lived, during the years referred to and up to the last time he [23] heard from her, and still lived, in Dardanelles, Turkey.

On cross-examination by defendant's counsel, the witness testified that Mrs. Penso's son lived with Mrs. Penso, his mother, and the son had never been in this country. That witness used to work in a sawmill at Hoquiam for the Hoquiam Lumber & Shingle Co. and the Coats Shingle Co. That he roomed with the deceased all the time. That deceased was about 40 years of age. That he could not write



(Testimony of Leon Benezra.)

at all. That he wrote all of deceased's letters. That he read all of deceased's letters and all of his correspondence.

**Testimony of J. A. Lewis, on Behalf of Plaintiff.]**

By stipulation of counsel an affidavit of one J. A. Lewis was read in behalf of plaintiff in lieu of a deposition, as the testimony of Mr. Lewis. This was as follows:

“J. A. LEWIS, being first duly sworn, upon oath, deposes and says: That he is the manager of the corporation known as the Coats Shingle Company, that at the time of his death Haim Penso was employed by the company at a daily wage of \$2.50 per day; that he had been steadily employed by the company as block piler for a period from May 14, 1912, to November 4, 1913, at which time he was killed. That of that time he worked 64 days at \$2.25 per day and worked 385 days at \$2.50 per day; and further affiant sayeth not.” [24]

**Testimony of John G. Girard, Witness for Plaintiff.**

Direct Examination.

Witness lived at 410 Monroe street, Hoquiam. Had lived there 29 years, was 30 years of age. That for seven years from 1906 to 1913, he had worked at the Hoquiam Lumber and Box factory in Hoquiam. *Last* for last four years he was there he had charge of the box factory.

That he lived in the north end of Hoquiam on the other side of the river from the Box Company's plant, it being on the east side.

(Testimony of John G. Girard.)

That the National Lumber & Box Co. was located on the east side of the river. That the railroad went right through the yard and a part of the plant was located on one side of the railroad track and part on the other. That he crossed the bridge there twice a day for nearly ten years and observed others crossing the same bridge. That employees used to cross the bridge going to work in the morning and returning home. That the employees of the plant referred to habitually crossed the bridge. That he had seen about 100 persons preparing to cross the bridge one time. That he had also seen that many crossing the bridge at a time. That he had been behind fifty himself, waiting his turn, and that this continued up to the time that he quit the National. Most anybody crossed during the last five years that witness was there. People had crossed it who were not employees that he knew of. People looking for jobs had crossed the bridge.

That he knew where the Eureka Lumber & Shingle Co. plant was located. That the employees of this company used the bridge. That he knew where the Posey Manufacturing Co. was located. That he did not know anything particular about the employees there. [25]

That he knew where the Coats Shingle Company's plant was located and that several of the employees of this company crossed the bridge.

That at one time witness was employed by the Boice Lumber Co. That three of the employees used the bridge. That when the bicycle of witness was broken

(Testimony of John G. Girard.)

he did. Witness was then shown Plaintiff's Exhibit 2, and pointed out to the jury where the bridge was located on the map and where the National Lumber & Box Company was located and stated that the box company was on one side and the sawmill was on the other side. That he worked in the box factory on the northerly side of the railroad. Also testified that he lived on the opposite side of the river from where he worked and pointed out on the map where he lived.

Witness then pointed out on the map where the Eureka Lumber Company's plant was located, the Coats plant, the Boice Lumber Company and the Posey Manufacturing Co.

That referring to persons not employees of these plants, he had seen people using the bridge looking for work and going home again if they did not find it, several of them.

That on the west side of the bridge, people would come from the Northwest Lumber Company's yards and they would strike a four-board walk about 80 feet long and then would come to a pair of stairs which would take you right up to the bridge. That you had a seven-foot walk up there and you were right on the bridge then. That the bridge was tinned for traffic. On the other end of the bridge, for the convenience of passengers there were planks on each side and steps on each side going down into the National yards.

That the main part of the town was on the west side of the [26] *west side of the river*, but there

(Testimony of John G. Girard.)

were lots of people living on the east side of the river. That with reference to people living on the east side of the river and going to work at the Northwestern mill across the bridge, there were several that crossed the bridge going to work at the Northwestern Mill and the Grays Harbor Mill too.

That women and children crossed the old bridge in 1906 or 1907, and that was about the only time that they crossed. That he meant by the old bridge a wooden bridge built there before the steel bridge was. That the steel bridge was built on practically the same site as the wooden bridge and was used by the same company. That there was no difference in the use of the old bridge and the steel bridge so far as people travelling back and forth were concerned.

That he went to work in the morning at 7 o'clock, leaving his home at half past six. That the bridge was closed pretty nearly every morning, excepting when there was a boat going through. That for the first period he worked there the bridge was closed for the men, but later on a log train was in the habit of coming through there about between half past six and seven, then it was always closed. That in the evening he crossed the bridge just after six.

That the bridge was closed a good deal of the time, so that traffic could *past* across it and it was closed a good deal of the time whether trains were passing back and forth or not. That he was never late at work unless the bridge detained him.

That he might have been delayed fifteen or twenty



(Testimony of John G. Girard.)

times during the years he worked there. That while witness was passing that way over to his work he would judge that out of about 600 working at the plant there must have been about 300 of [27] them crossed the bridge. That the bridge was sometimes open for the purpose of boats passing through. That if it was open for boats passing through it would then be closed for men to pass over if there were any men waiting.

The witness testified that the walk which had been built along the side of the bridge for foot traffic had been in its present condition for a great many years. That it was built before he went to Hoquiam. The walk was four boards wide, between seven or eight feet long and the steps were about 12 or 14 feet high and at the tops of the rails of the bridge there was a platform about eight feet wide and about seven feet long. That the walk with reference to the railroad track was seven or eight feet below the track.

That at the end people got up to the railroad track by the steps. That there were between ten and thirteen steps, somewhere along there. That the platform was on the bridge at a point where people reached the railroad track from the steps. That it was about eight feet long and seven feet wide and it runs to the first left-hand side rail. That a picture shown witness by plaintiff's counsel fairly represented the condition it was in in November, 1913, at the time the deceased was killed. The photograph (a picture) was admitted in evidence and marked Plaintiff's Exhibit No. 5.

(Testimony of John G. Girard.)

That he did not know of any change in the platform since November, 1913. There might have been some new boards put on it. There was none when he was there the other day. That the photograph handed him showed the bridge was open for boats to pass. The photograph was then offered in evidence and marked Plaintiff's Exhibit No. 6.

Witness was then handed another photograph and stated that it represented the west end of the bridge. The end the platform [28] was on, first existed in November, 1913. That he did not think there were any changes since then. The photograph was admitted in evidence and marked Plaintiff's Exhibit No. 7.

That as to the condition of the railroad track lead-up to the bridge that he would judge up and towards the depot from the bridge to be between 250 and 300 feet; there was a little curve. That the curve would not take up so very much of the track. That a train approaching from the depot to the bridge would not approach it on a straight line. There was a kind of a double curve in the track when it goes down beyond there.

Witness was then handed a photograph and stated that it fairly represented the condition of the track in the vicinity of the bridge to the westerly and leading up to the bridge from the Hoquiam depot as it existed in November, 1913, and that the curve he referred to was shown on this picture. That the track had always been in the condition it was shown on the *photograph fairly* represented the track. The

(Testimony of John G. Girard.)

photograph was then admitted in evidence and marked Plaintiff's Exhibit No. 8.

That there was a grade going up to the bridge at the westerly end of the bridge. That a person could stand on the bridge and at about 700 feet could see the rays of a light from the headlight upon a locomotive; he could not get a definite view of it until it was around the curve. That when he referred to the rays of light he referred to the rays on the engine. That a person would first get a view of the headlight itself about 300 feet from the westerly end of the bridge. That the curve commenced 250 or 300 feet from the westerly end. That he had testified that men who worked in the Northwestern on the west side of the bridge travelled over the bridge to the east side if they lived there. [29]

The witness was then shown Plaintiff's Exhibit No. 5 and indicated where he had seen people standing on the board-walk and on the steps and platform and way back on the platform had stood in line waiting to get across while some boat was going through. That he had seen fifty or more people there at a time under these conditions. After the boat would pass through, if the bridge was ready to be closed, it would be closed for the people to cross.

On cross-examination witness was shown by defendant's counsel a photograph purporting to show the westerly approach of the bridge. Witness stated that it did show the westerly approach and that the curve he had testified about was upon the photograph. That the Northwestern Lumber Co. had property on

(Testimony of John G. Girard.)

either side of the track. That the National Lumber & Box Co. and the other companies he had mentioned were on the east side of the bridge. That he did not know whether (No Trespass) sign that showed on the photograph had been there. That he had never been out that way. That the photograph was a fair representation of the condition which it purported to show. Defendant then offered this photograph in evidence. It was admitted and marked Defendant's Exhibit "A."

Witness was then shown another photograph by defendant's counsel and stated that it showed the westerly approach near the bridge, showing the straight track about 300 feet which had been mentioned by witness and stated that the car shown on the photograph, standing on the track, was standing at about the curve and about 300 feet from the westerly end of the bridge. That from the car to the westerly end of the draw would be about 300 feet. That the photograph was a good [30] picture of what it intended to show. Whereupon defendant's counsel offered the photograph in evidence and it was admitted and marked Defendant's Exhibit "B."

Defendant's counsel then presented to the witness another photograph and the witness stated that it showed the whole bridge and the straight-away referred to at the west end of the bridge, the walk to the house in which the bridge-tender operated. Defendant's counsel then offered this photograph in evidence and it was admitted in evidence and marked Defendant's Exhibit "C."



(Testimony of John G. Girard.)

Defendant's counsel then showed the witness another photograph and witness stated that it showed the west approach, looking through the bridge to the westerly platform. Defendant's counsel then offered this photograph in evidence and it was admitted and marked Defendant's Exhibit "D."

Witness testified that the westerly approach of the bridge was for some distance on piling or trestle and was elevated. That there was a little grade in it. That the approach to the bridge from the easterly side was also along trestle, quite high. That the trestle on the east side where it goes up to the easterly side of the span of the draw was about twelve or fourteen feet high from the ground, that on the westerly side it was more than that. That the length of the trestle work on the easterly side of the river, where it goes down, and before the track comes down to the ground the witness would judge was about  $2\frac{1}{2}$  blocks, and on the westerly side 450 feet. That it was 8 or 10 blocks from Hoquiam station to the westerly end of the bridge. That it was over 2,000 feet anyway. That it would take a man twelve to fifteen minutes to walk from the westerly end of the bridge to the Coats Mill where the decedent was working. The distance would be about a [31] quarter of a mile. That the draw span of the bridge was about 300 feet in length. That several boats would go through the draw during twenty-four hours in each day, in fact a good many boats. That it was an important river. That there were some big sawmills and other manufacturing plants up the Hoquiam River from where

(Testimony of John G. Girard.)

the bridge was. That the bridge was near the mouth of the Hoquiam River and Grays Harbor, near the the junction of these, very close to them, and that boats in order to get through to big plants would have to go through the draw. That all of the trains that went into and out of Hoquiam must go over this bridge and did so at the time of the injury. That the Northern Pacific, Oregon-Washington and Milwaukee all operated all of their trains over the bridge. That this applied to passenger and freight, switch-engines and everything. There was no other way for a train to cross the Hoquiam River, excepting over this bridge. The bridge was used a great deal and very extensively every day. That there would be a considerable number of trains passing over the bridge each day. That if a man were 300 feet away on the track or the trestle east of the easterly end of the bridge and if a car, at night, approaching the westerly end of the bridge when it was 300 feet away or when it was on the straight track a man about 300 or 500 feet away on the east side could see the headlight right through the bridge. That a man could not see the headlight propably if it were a quarter of a mile. That there was a curve that prevented. That he could not tell how far this curve was from the east end of the bridge and then stated that it was about 500 feet.

That a man standing on the track or trestle east of the bridge could see the headlight and the approaching train when [32] it was about 300 feet west of the westerly approach. Could see the head-

(Testimony of John G. Girard.)

light if it was a clear day or a clear night, he could not see it if it was very dark. That the headlight could not be seen 1,000 feet, if it was raining and pretty dark and the wind blowing. That he thought it could be seen about 500 or 600 feet. That the headlight could be seen twice the length of the bridge, in any event. That there was a platform on the bridge at the left-hand side of the track, and there was a kind of smaller platform on the west side, that is three or four boards. That about the middle of the bridge there was a platform with a little house upon it on the left-hand side and on the extreme easterly end of the bridge there was another platform and stairs descending, very similar to the one shown in the photograph, exhibit "D" on the westerly side.

Witness was then shown another photograph showing the westerly approach to the bridge and *and* reverse curve and stated that this was a photograph so showing, and that this picture showed the reverse curve leading to the bridge. Defendant's counsel then offered the same in evidence and it was admitted in evidence and marked Defendant's Exhibit "E."

On redirect examination, on behalf of plaintiff, witness testified that in passing over the bridge from the National mill that he never traveled on the trestle, that he got upon the bridge by way of the steps. That there used to be a driveway from the National Box Company's plant, underneath the trestle and across the street—Riverside Avenue, from one side of the plant to the other. That the com-

(Testimony of John G. Girard.)

pany dumped their logs, and took out the passageway and put in a little platform about three boards wide. That there was a footpath of about twelve feet of plank roadway, and then there was [33] a little trestle about 20 feet long. That there was a foot passageway from one portion of the mill to the other, located on Riverside street.

That at the other end, near the Northwestern plant there was a roadway to the shingle mill. That they drove teams through there, underneath the trestle.

Witness testified that from the box factory those who would cross the bridge would go across a space, down over a hump, and some would go over the trestle, while others from the sawmill and other places would go down (indicating) and go down the steps and across the bridge. That some of those in the west end of the town went down the trestle, but very few of them. That a majority of persons crossing the bridge went down the steps. That the notice referred to by defendant's counsel on cross-examination was about 500 feet from the east end of the of the trestle—from the bridge to the end of the trestle. That he meant by the bridge where the draw was. That there was no such notice on the bridge itself. That he did not know of any notice on the westerly end of the bridge. That during the seven years he was there he never saw any notice at all until he saw the photograph referred to. That from the foot of the steps, along the walk to the place where the Northwestern roadway runs under the



(Testimony of John G. Girard.)

bridge was about 80 feet. That at the other end of the bridge the National's footpath, which was formerly a roadway passed under the bridge itself.

In 1906, when there was a wooden bridge there the witness and others had a pass. That they used these passes for ten or twelve months and paid 50 cents per month for each pass. Then they were given a button. This did not continue many months. Then after that there were no objections to persons using the [34] track at all. That the use of the buttons was discontinued in about 1908. That since 1908, there had been no restrictions on anyone passing back and forth across the bridge, so far as he knew. Sometimes the bridge-tender would be pretty sore and would stop them for a couple of days and then let them go across again. That his objections consisted of being just sore.

That the last time he knew of anyone being stopped with reference to crossing back and forth across the bridge was one time when they did not have a button. That he used to live on the west side and that his brother was living on the east side and his brother was going to come over to have dinner with him. This was in 1907.

On recross-examination the witness testified that he did not know whether the railroad company gave out any buttons. That they were given out at the National Office. That he did not know who paid the 50 cents out of the workmen's wages.

Witness was then shown a photograph by defendant's counsel and testified that it showed the east-

(Testimony of John G. Girard.)

erly approach to the bridge, the shipping sheds, and the bridge in the distance. That the witness saw the "No Trespass" sign on the photograph as shown him but that he never seen this "No Trespass" sign before. That this notice might have been there a long time, but he never had any occasion to go up that way. Then counsel for defendant offered in evidence the photograph *referred*. Mr. Morgan, of counsel for plaintiff, was then permitted to examine the witness and the witness stated that he had never seen the notice and he never heard others say whether there was a notice there or not. That this notice had not come under his observation in November, 1913. He had never seen it. It might have been there. Thereupon the photograph was admitted in evidence and marked Defendant's Exhibit "F." [35]

**Testimony of Theo. Balabanas, Witness for Plaintiff.**

THEO. BALABANAS, a witness for plaintiff, being sworn, testified: That he knew the deceased in his lifetime. Deceased was killed in November, 1913. Just prior to being killed he was working at the Coats Shingle Mill factory. That he and deceased left the factory on the day deceased was killed at a quarter to six in the afternoon. Deceased and witness had been working at this mill for about a year. Witness had known deceased for four years. First met him at Hoquiam. When witness and deceased were working at the shingle mill deceased was working steadily. Deceased and witness were working at moving blocks from the chains and putting them up

(Testimony of Theo. Balabanas.)

on the tables. They were working on the same job, in the same mill. That witness had crossed the railroad bridge that goes across the Hoquiam River many times. While working for the Coats Shingle Mill he crossed the bridge every night but not in the morning. That witness lived on 11th street towards town. He and deceased, on the evening of the accident, left the mill at a quarter to six and were on the bridge at six o'clock. It took fifteen minutes to walk from the mill to the bridge. It was a fairly dark night and was raining a little. Deceased was hurt on the bridge. Knocked down by the car. He was struck and then his body went down and witness did not see his body.

Witness and deceased was going towards the bridge when deceased was struck by the car, and towards town. It was a gasoline car which goes to Montesano that struck him. When crossing the bridge deceased and witness were walking together. At the time deceased was struck by the car witness stopped to roll a cigarette and Penso went on ahead, They were in the [36] middle of the bridge when the car was approaching. That when walking across the bridge there were planks that they walked on, and were going towards Hoquiam. That witness did not know when the car was coming, but he and deceased were passing on the bridge every night. They were crossing the bridge every night. Witness did not know whether the car would cross the bridge at that time or not. The witness did not hear any whistle from the car. Did not hear any

(Testimony of Theo. Balabanas.)

bell ringing. That the way he knew the car was coming was when he stopped to roll his cigarette and deceased passed a few steps ahead, then the car passed right ahead. That when witness saw the car he started to walk and when deceased was struck witness went over and dropped on to an iron post on the bridge. That he got over to the iron post by stepping on the rail and then putting his hand upon the post. Witness then pointed out the post on Plaintiff's Exhibit 7, which he got hold of, saying it was the post right in the middle of the bridge. Witness then pointed out and marked the post on Plaintiff's Exhibit 7, which he got hold of, pointing to the upright post nearest the west end of the bridge on the up-river side. That as the witness stopped deceased was right on the step, and deceased was struck by the car and then the passengers and some of the brakemen came down with ladders and were looking for the body and they only found his dinner pail.

That witness stepped over and put his hand around the post and stopped there. Asked how soon he did that after he saw the light on the car. he answered it was about 24 feet. That after the witness saw the light of the car and before he moved to the post he put his arms around. Witness had walked four or five feet after he saw the car coming, then he put his hands around the post and stayed there, and then came down again. When the deceased was struck witness dropped the post. [37]

That there was no place deceased could have got-



(Testimony of Theo. Balabanas.)

ten off the bridge, excepting the platform that deceased was going towards, after the car was seen. That there was no other room or platform, excepting the stairs. That Penso was killed, but that he did not see him. After witness saw the light of the car deceased was running to cross the steps and as he tried to cross the steps deceased was knocked down by the car. Deceased was trying to put his feet on the stairs when he was struck by the car. He meant by the stairs, on the platform. Right on the platform. That one of the feet of deceased was on the rail and one on the platform. That after witness saw the light of the car there was no place deceased could have gotten to as a place of safety, excepting the platform towards which he was running. That as to why there was not any other place he did not know. There were only a few boards inside the rails and no other room at all. That deceased could not have stepped off on the side like witness did because deceased was ahead, right close to the stairs. That there was no place on the side of the bridge where deceased could have got hold of before getting to the platform. That he did not know how many minutes it was after witness saw the light on the car until deceased was struck by the car, but that he did know that deceased was running to get to a place of safety.

On cross-examination by defendant's counsel the same witness testified: That he and deceased had been working at the Coats Mill for a year and that he and deceased, every night, during that time crossed over the bridge. That in going to work in

(Testimony of Theo. Balabanas.)

the morning the witness crossed the wagon bridge, which was across the Hoquiam River, on the electric car. That electric cars [38] crossed over the regular wagon bridge. That witness, when crossing the railroad bridge in the evenings did not, before this time, see any such car and only saw it at the depot sometimes, and only on holidays and Sundays. That he did not know what time the car left the depot for Montesano. That on the night of the accident he and deceased quit work at a quarter to six, the other nights they went home at ten minutes to six and stated that sometimes they quit work at ten minutes to six and sometimes at a quarter to six, but the night deceased was struck they left at a quarter to six. That witness did not know if the time the motor-car left Hoquiam station was six o'clock and had been such for a long time. That he had met this car sometimes on Sundays and had seen it at the depot only on Sundays. That he and deceased always went home, going from work. that nobody else went with them. That deceased smoked sometimes, but was not smoking that night after the two left the mill. That witness lived on 11th street, and deceased lived on the other side of the police station.

On redirect examination, for plaintiff, witness testified that deceased was in good health and was workings during *during* the year previous to his death.

**Testimony of Christ Zurbas, a Witness for Plaintiff.**

CHRIST ZURBAS, called as a witness for plaintiff, testified as follows: That he was on the bridge

(Testimony of Christ Zurbas.)

the night deceased was killed. Had been working that day at the National. Prior to this had been working at the National for four months and had crossed the bridge every night. It was raining and windy that night. Deceased was killed about 6 o'clock. There were other persons on the bridge at that time. 15, 20 or 25, he could not tell the actual number. That witness was [39] on the National Lumber & Box Company's side, or the town side of the bridge at the time Penso was killed. That witness was in the middle of the bridge. That he had seen these gas cars a couple of times before while on the bridge. That many men from the other mills were in the habit of crossing the bridge after they quit work at night. That the men who were on the bridge that night did not do anything in the way of signalling to the car.

**Testimony of John G. Girard, Witness for Plaintiff.**

JOHN G. GIRARD, recalled on behalf of plaintiff, testified, that he had seen the gas car referred to. That when in operation it was very quiet. That he would say it went very quiet unless they were blowing the whistle or ringing the bell it would sneak right up to a man before he knew it, in his estimation of things. Compared with a street-car or trolley car he would judge it would make about the same amount of noise. Witness' attention was called to Defendant's Exhibit "B" and stated that he recognized the photograph of defendant's gas car. That he could not tell whether the headlight on the gas car was a standard headlight such as are used on loco-

(Testimony of John G. Girard.)

motives, or whether it was a special sort of headlight. That the headlight on the gas car was located in the middle of the front of the car, similar to a street car. That he did not know whether it was an electric light or a gas light. That he never paid any attention to this headlight. Never saw it lit.

On cross-examination on behalf of defendant, witness testified that he recognized the photograph shown him as looking like the car in question and he recognized that it was apparently on the westerly end of the bridge. Probably not entirely on the [40] bridge, about half and half. The photograph was then offered in evidence by defendant to show the height of the light. It was admitted in evidence, marked Defendant's Exhibit "G."

That the car was considerably larger than an ordinary street-car, and heavier. It was a steel car. That witness could not tell whether it would make a good deal of noise going across the bridge but that he thought that in crossing a bridge any kind of a car could make considerable noise.

### **Leon Benezra, Witness for Plaintiff, Recalled.**

LEON BENEZRA, being recalled for plaintiff, testified that deceased could not read his own language, it was hard for him to learn. That he could not read English. That after deceased was killed witness spent over \$20 to find the body. That he used to see in the papers where they could find bodies and that the fourth time he went to the undertakers he identified the shoes and clothing of the deceased and then



wired deceased's brother in New York. That the body was at the undertakers. That he identified the body by the shoes. He used to wear a pair of Turkish boots from the old country, and had worn them about four years. That witness found the Turkish boots referred to.

Plaintiff then rested, with the exception that the right was reserved to offer in evidence the tables showing the expectancy of life of the deceased. There was no objection to this.

Defendant then moved for a nonsuit on the ground that the evidence was insufficient to show negligence on the part of the defendant company, and also upon the ground that the evidence showed that the deceased was guilty of contributory negligence. Also that it was not shown that deceased and Esther Romi Penso were husband and wife or that either of the plaintiffs [41] were dependent upon the deceased for support. The motion was denied by the Court and an exception allowed defendant.

Counsel for plaintiff then produced the American Experience Table of Mortality, for the purpose of showing that the expectancy of life of deceased at the time of his death, at which time counsel stated he was forty-eight years old, was 28.18 years and that the expectancy of life of the widow, 35 years old, would be 31.78 years. Counsel for defendant stipulated that the tables would show as counsel had stated, but did not admit the materiality of the testimony, and objected to it on the ground that it was incompetent, irrelevant and immaterial. The objection was overruled and an exception was allowed.

**Testimony of J. Hendricks, for Defendant.**

J. HENDRICKS was called as witness on behalf of defendant. Age 32 years. That he was employed as engineer by the defendant company at Hoquiam, Aberdeen, and in that section. He remembered the circumstances of the alleged killing of the deceased, which had been referred to in the trial. That on November 4, 1913, he was the engineer in charge of the gasoline car. He had been operating this car about ten days, over this bridge and along the thoroughfare there. That he had run trains over the bridge before, and had been over this same bridge a good many times before with trains. These were locomotive trains. That during the ten days before the accident he had operated the car every day across the bridge, crossing the bridge four times a day, two going and two back. The schedule time of the car was 6 o'clock, leaving the Hoquiam station and was about three minutes run from there to the bridge and it took about one minute to cross the bridge and on the evening of the 4th of November, the time of the accident, the car left Hoquiam [42] at 6 o'clock. That when the car was just ready to leave Hoquiam he started the bell ringing, before he started the engine or started the train, at the time the car left Hoquiam, at 6 o'clock on the evening of November 4th. The bell was an automatic air bell, self-ringer, started by a little valve in the cab. You would open the valve and the air flows through and operates the bell from the top of the cab. That he started this bell in operation before

(Testimony of J. Hendricks.)

leaving Hoquiam. That it continued to ring from that time until the car stopped after the accident occurred. That the bell could be heard ringing two blocks away easily, about 1,000 to 1,200 feet. That the ringing was continuous. That there was no way to stop the bell, except by shutting off the valve by the engineer. That it was his custom and habit during the ten days he was operating the car to have the bell ringing when crossing the bridge, and always did so. The ringing of the bell was intended for a warning for everyone that was liable to be in front of or in the way. That after leaving Hoquiam at 6 o'clock on that evening he sounded the whistle of the engine. That it was necessary to call for the semaphores, about half a block from the bridge, and approach the semaphore calling for it, giving one long blast of the whistle. The semaphore man, who was situated in the center of the bridge, would return the signal, which would be a green or red light. A red light was a stop signal and a green light was to proceed. Upon receiving these signals the engineer would answer by two short blasts of the whistle, which signified that he had accepted the bridge. That this was the regulation and rules of the railroad company and the practice of that company and all other companies using the bridge. That he blew the two whistles on the evening of the accident. That after he blew [43] the first whistle he got the green light in return, which meant to proceed, then he blew two short whistles after receiving the green light to signify that he had accepted the

(Testimony of J. Hendricks.)

bridge and was proceeding. The object of the semaphore is to control trains. It is a board straight up and a board with an arm standing out with a light on the top of it. If the arm stands straight out it is a danger signal. When the signal man drops that signal it signifies clear; it will also show a light, red for danger, green for clear. The object of having the semaphore was for the operation of the draw; it being a draw bridge. It was necessary to have a signal before trains could use the bridge. Within fifteen feet of the bridge there was a derail. If it was undertaken to operate on the track without getting these signals the engine or train would be liable to run over the derail and go into the river. The whistle could be heard a quarter of a mile away; and in going into Hoquiam he would blow the whistle over a quarter of a mile away for the bridge. That there was an upgrade of about four or five per cent going up the trestle or approaches to the bridge. At six o'clock in the evening he thought he always met somebody along on the bridge. Sometimes people would be walking across and would get into the clear and again they would be in the clear. That there would never be more than two or three on the bridge at a time but at the platform at the end of the bridge he had seen it loaded with persons, ready to enter the bridge as soon as he got off.

That when he got up on the bridge on the night of the accident his engine was traveling about six miles an hour. That he knew the speed because it was a geared car. That it had to be operated about ten



(Testimony of J. Hendricks.)

miles before it became necessary to change the gears and that he had not changed the gears. The [44] engine was moving at the same speed as it approached the bridge from Hoquiam. There was a headlight on the motor-car, and it was lit at the time of the accident and before. That he lit it at Montesano before starting out *and was* burning at all times from that on. That on the evening of the accident he observed one man on the bridge approaching in the ordinary way. When he first saw him he was distant about 300 feet and was walking towards the car and was in the center of the track. That there was a tin covering between the tracks. He did not know the man he saw. Did not know deceased during his lifetime. The man was walking up and away toward the motor-car and he stepped off to one side and that all witness saw was that he turned around and jumped in front as if he was going to make a get-away or something and witness immediately applied the emergency air and stopped and did not see anything more of the man. That he applied the emergency air as soon as the man he saw started back away from where he was and that he stopped the car. He did not see anybody hit and did not feel any impact. The bell was ringing when the car stopped. That he did not discover anybody else on the track or bridge until the got out of the motor-car and was on the track. That he did not see any dead body or helpless body or anyone in a crippled condition. That all he knew was that somebody found a dinner pail. That he had no knowledge of what became of

(Testimony of J. Hendricks.)

the man he referred to as stepping off the side of the bridge in front of the car. That he stopped his car as soon as he could after he discovered that the man was attempting to move from his place. As quick as he saw the man moving he threw on all of the air, that is the emergency brake and stopped the car. When he saw the man moving it appeared as if he was going toward a pillar—which [45] witness supposed he was going to lean up against. By pillar he meant one of the uprights of the bridge. That a man could lean against an upright with safety, without the car hitting him. That he supposed the man was safe when he was at this pillar and had no reason to think he was liable to be hit. That this was a common occurrence there on the bridge when people were crossing it. That people were seen there every once in awhile. That the man made some motions from this upright and when he did the witness stopped the car just as soon as he could.

Witness then testified that the bridge is the part that swings. The draw. The other part, before you get to the bridge is trestle work—the bridge is what swings around or the center of it. That he stopped the car between ten and fifteen feet. It had been raining hard and was windy and dark.

On cross-examination by plaintiff's counsel the witness testified.

That he lived at Seattle about 25 years, occupation locomotive engineer, had been with the defendant four years and previous to that had been with the

(Testimony of J. Hendricks.)

N. P. for ten years. That he never ran for the N. P. on the Grays Harbor branch prior to the accident. That for the N. P. he had run between Bellingham, Seattle and Sedro Wooley. By occupation he was an engineer of steam locomotives. That at the time of the accident he had been operating gas cars ten days. That the gas car referred to was propelled by a gasoline engine located in the car itself, and the operation of the car was altogether different from the operation of a steam locomotive. That this car could be operated at a very high speed—45 or 50 miles per hour. The speed could be regulated. That it differed from the operation of a steam train in that it picks up and gathers speed very quickly and [46] could be stopped much more quickly than the ordinary steam train. That his experience in the operation of gasoline cars before the ten days period which he had been speaking of was this: That he went to North Yakima and studied the car eighteen days at the shop, and then he operated the car for twenty days in practice. Then he took the car himself. That prior to this time he had operated a steam locomotive for the defendant across this bridge. That since the time of the accident he had been operating a locomotive for defendant.

That the semaphore was there before the witness came there. The semaphore was in operation all the time he was there and before. That he could not be mistaken about it. That the bell on the car was operated automatically by air pressure. The air

(Testimony of J. Hendricks.)

was supplied by and air-pump and air-brake. That the bell never got out of order in such a way that it stopped ringing.

That on a locomotive the bell could be rung by a rope or by air. The engineer would operate it by air and the fireman by rope; but the gasoline car is fixed by the engineer alone. He operated it by air. That it was not necessary to have a rope; that it was an air valve. *That the* ordinary whistle such as was used on street-cars, but much larger than on street-cars. That it was operated from the same tank that the bell was operated from.

That the headlight was lighted by acetylene gas. That it was a standard light. All the engines formerly had acetylene gas before the State required electric lights. That it was not such a headlight as was used on steam locomotives.

That Defendant's Exhibit "G" did not show the car referred to. The number of the car was 607. That was not the car shown in the picture. That the one in the photograph, however, was one [47] exactly like it. That it was its mate but it was not the same car. It was just the same as the car in the photograph. You could not tell them apart, only the number was different. That the headlight on 607 was the same as the one shown on the photograph, located in the same place.

That the gas-car had a cowcatcher on it similar to that on a steam locomotive and that the headlight was located to the center of the car about half way up



(Testimony of J. Hendricks.)

the height of the car. That there was no difference at all, so far as witness could see, between this headlight and that used upon the ordinary steam locomotive. That it was not as strong as an electric light but it was as strong as was ever used and a lot stronger than was used in the yards or any place else. That the acetylene light was not a varying light, but was a steady light. That the whistle was located right opposite the bell.

Witness marked on Defendant's Exhibit "G" a letter A at the point which he indicated the whistle was. That the whistle worked upon the same principle as a steam whistle on an ordinary locomotive, but was not quite so large. That you could not hear an air whistle like a big locomotive steam whistle. That steam whistles varied considerably. That he had used *whistle* that shrieked. That the ordinary air whistle is much smaller than the ordinary locomotive whistle, but he did not know whether it was any higher pitched or not.

That he thought the accident occurred on November 5th, it was somewhere around there. That he made a record of it at the time. The night was very dark and it was raining and it was windy, and blowing strong. Witness was then shown Defendant's Exhibit "E" and stated that he recognized a portion of it as being the westerly approach to the Hoquiam River bridge. That leading up from the depot towards the bridge from the west there [48] was quite a long straight stretch of track approaching the bridge, and as the curve in the track was ap-

(Testimony of J. Hendricks.)

proached the headlight would be thrown away from the direction of the bridge. That it was a reverse curve he referred to. That in the course of time the engine would come back on entering the straight stretch of track and the headlight would throw on the bridge. That the photograph shown witness fairly represented the reverse curve which he had spoken of, and the straight stretch of track was not shown in the photograph. That it was beind the point where the picture was evidently taken.

Coming up with a gas-car from the Hoquiam depot along the straight stretch of track the reflection of the gas-light would not show until it struck the curve. That is would show in the center of the track until it reached the curve. That the center of the track was not in line with the bridge on the straight track. That when the engine would reach the curve the headlight would throw a reflection to the west of the bridge until the curve was passed over. Just as soon as the engine entered the straight track again it would show on the bridge. It was 290 or 300 feet from the end of the curve to the bridge. That this acetylene headlight on the gas-car would throw a light on to the bridge as soon as that of a steam locomotive would throw it. It would throw the light just as quick as the engine entered the straight track again. That the light of a steam locomotive would not be shown until the straight track was entered.

That on the evening of the accident the witness could see the full length of the bridge when he got

(Testimony of J. Hendricks.)

around the straight part of the track. That he could see from the curve along the straight stretch of track 290 feet to the bridge. That he could see clear through. That he had stated in response to a [49] question previously propounded that there were a good many people accustomed to passing back and forth across the bridge and that he had at a number of times seen a number of people on the bridge when trains had passed over.

That when he first saw men or any man on the bridge of this particular night was when he had just come around the curve and started on the straight piece of track, entered the bridge, he was looking out observing to see if anyone was on the bridge. That was about—he thought right at the point on the curve at the place where the car came on to the straight track so that the headlight showed right on the bridge and this is when he first saw the man far ahead. That he only saw one man. That he was walking towards the car. That he could not say for sure what part of the bridge the man was on at that time, but he thought it was about the center of the bridge. He walked quite a little way towards the car and finally stepped off towards one side and then he bobbed up again and that was the last he saw of him. When the man tried to make his get-away or something like that he was right over to one side of the bridge and about 20 feet from the end. That is the westerly end of the bridge. The witness applied the emergency brake when he saw the man attempting to turn. That is at the time the man tried to make his

(Testimony of J. Hendricks.)

get-away witness applied the emergency brakes. That up to this time the witness had assumed that the man would get away. That if he had stayed where he was he would have been in the clear. He was over to one side. He naturally supposed the man was going to stay there. That they generally did, when they lined up alongside the bridge they stayed there until after the car had passed. That he never saw any other men on that bridge that night until after he stopped the car and got out in [50] front; then there was a great number. He tried to make them understand that he thought somebody was there, but he could not impress it upon them, that they did not sabe—that they just gone down and crawled by the car as if they were a swarm of bees or something. All they did was to try and get away. He tried to impress upon them that some of their people had either fallen over or had been knocked over, he did not know which. That he stopped the car on the bridge and about half of the car was on the bridge. That he did not back the car up. Never moved the car at all until he got ready to proceed. He did not think any of the crew went down to the water's edge. That he stopped the car at once. That he told the conductor right at the time that he saw somebody dodge in front of the car. That he did not think the conductor went down to the water's edge. That the conductor was with him all the time. That somebody picked up a dinner pail. He saw it there. That he did not see the middle man in the front seat in the courtroom on the bridge that night



(Testimony of J. Hendricks.)

and did not see him there at all. Nor did he see him in the center of the track. That he did not see any one there rolling a cigarette.

The last he saw of the man he supposed to have been hit was about where he marked a cross on Defendant's Exhibit "B," but witness stated that this was not definite, that he did not know just where the man was. That he did not see the man supposed to have been ahead run; all he saw was when he turned around he supposed he was going to jump away. Did not know what he was going to do. Did not see him run at any time. After he got off the car he looked around to see if he could see any object lying around. That is he looked around the pillars and beam where he thought the man was. That he did not look down [51] upon the pier itself. That is the concrete pier upon which the bridge rests. The bridge rested upon a concrete pier. That he did not pick up the dinner pail referred to. That he saw it a few feet away from the front end of the car. Did not know who picked it up. It was lying on the bridge at the time he saw it. That he did not know whether he had seen forty or fifty men crossing the bridge at a time, but he had seen over a dozen. They would all be holding on to the piers. Some of them would step down into the clear, some would be on the platform. Others would hang on to the steps. Any place between the guard-rail to the side of the bridge would be in the clear. The car would not cover practically the entire length of the ties; the ties were longer than the ordinary ties on the ground.

(Testimony of J. Hendricks.)

That a person could stand and lean up against an upright. That he could not stand up straight, but could stand on the end of the tie and lean over towards the bridge and the car would pass him. That if a person were opposite the place where one of the upright beams of the bridge was located he could leave his feet on the ties and lean up against the upright beam and be in the clear, otherwise a person would not be in the clear.

On redirect examination by defendant's counsel witness testified: That he was in the employ of defendant company at this time. That he never had any difficulty in the operation of the gasoline car. That there was no other accident, excepting this one, that occurred while he was using the bridge, or that he ever saw.

On recross-examination the witness testified: That he was now operating a steam locomotive. That he operated the gas-car until they pulled it out of service. That another gas-car had been put in its place. That car 607 is now at North Yakima and in service. [52]

**Testimony of Louis H. Lucky, Witness for  
Defendant.**

LOUIS H. LUCKY, being sworn as a witness for defendant testified as follows:

Lived at Hoquiam about seven years. 28 years old. Was familiar with the bridge and its approaches. Had been familiar with it about two years or better. That in that time he had passed over it

(Testimony of Louis H. Lucky.)

several times. That he only crossed it twice a day for about a year and a half while he was working for the National Lumber & Box Co. That this was on the east side and he lived on the west side during this time. During these two years lots of people passed over the bridge. That he would judge there was about 100 crossing the bridge every evening. In the morning there would be about half that many. That he did not know whether persons passed over the bridge in the middle of the day. That he knew trains ran over the bridge. That he did not know how frequently, but there must have been four or five trains during the day,—that is passenger trains. That freight trains also passed over the bridge. That he was familiar with the upper construction of the bridge, as to its uprights and so on. That he had met trains in going across the bridge, and he had seen other people on the bridge when trains were passing. That people would get out of the way of the train, down to the side. Some would step to the end of the ties and lean over and some would go down a little farther on the steel plates below. That those who would stay on the end of the ties and lean over would lean against the steel part of the bridge, against steel beams or uprights. That these beams or uprights were about twenty-five feet apart, and were on each side of the bridge. That during the time he used the bridge he never saw any accident, excepting this one, or knew of any. That he crossed the bridge the night of the accident at about five minutes [53] after six, he thought, in the evening.

(Testimony of Louis H. Lucky.)

That he was on the east side, going to the west side from where he was working to where he was living. That he saw the gasoline engine going along there that evening at about 6 o'clock. That when he first saw the gasoline car or its headlight, or the rays of the gasoline car, he was in the middle of the track on the bridge. That he was not quite half way over the bridge when he first saw the light. By the bridge he meant the part upon which the draw was. The car at this time was about 300 feet away. Witness at this time was in the center of the track. He saw one man ahead of him. This man was walking in the middle of the track, the car in the meantime was coming towards witness. That he did not see the car knock or hit the man. That he stepped down to clear himself, on the steel work, down opposite the ties. That the car did not pass him. That after he got down on the steel plates he saw the man. That he was alongside the steel when witness saw him—of the steel that goes up and down the bridge. Then the man started to walk right towards the end of the bridge and he got pretty close in touch with the car and after that he did not see him. The man disappeared. The car stopped within a few feet. After the man disappeared witness got off the plate and went up to where the car was. He then looked around a little bit and didn't find anybody or any person crippled; nor did he find any blood. That people gathered there after the car stopped. Quite a number. They evidently came from behind witness and cross the bridge. That he was in a posi-



(Testimony of Louis H. Lucky.)

tion to tell whether the bell was ringing. That it was ringing. That he heard the bell ring just when he approached the bridge, on the other end. The ringing was continuous. That it was still ringing when the car stopped. That he [54] remembered the semaphore board. That the whistle was blown in connection with the semaphore board. That he heard a whistle, more than one. That he was about three hundred feet from the bridge when he heard the whistle. He was not sure whether this was the first whistle or the last whistle. It was a loud whistle, and he judged it could be heard a quarter of a mile or so. Did not know the man on the track ahead of him on the bridge. Did not know the deceased in his lifetime.

Witness was then shown a photograph and asked whether he could tell from that where the plate was that he got on to. The witness stated that he could. That the photograph described the situation so far as the plate was concerned. Showed the uprights he spoke of and how a man could lean up against an upright. Whereupon the photograph was offered in evidence by defendant and marked Defendant's Exhibit "H."

Witness then stated that the plate was where he was standing, as shown in the photograph. That there were plates of this kind about every 25 feet on the bridge, on both sides. That the gasoline car or engine had been operated over the bridge prior to the accident for sometime. He did not know how long. He would judge it was about four or five

(Testimony of Louis H. Lucky.)

months. He did not know how often gasoline cars operated over this bridge. That he met this car coming across every night, about six o'clock. That he was not in the employ of the defendant company and had not been.

On cross-examination by plaintiff's counsel witness testified.

That he boarded at the Washingtonian Hotel on 10th street. That previous to Tuesday before he was testifying he worked at the Northwest, and had been for about nine months, but was not working there now. That he worked at the National previous [55] to that time. That he had no family. Had boarded at the Washingtonian Hotel about five years. At the time of the accident he was working at the National. That when the car was stopped he went up to it and looked around. He was looking to see if he could find anybody that was hurt. That nothing was said at that time about anyone being hurt. That he was there about five or ten minutes and quite a crowd gathered. That he did not know what was said by the crowd or anyone about anyone being hurt. He heard somebody say that they knocked somebody off or somebody fell off. That was all. Did not see anybody fall or knocked off. That at the middle of the span was the thing the draw rested on, when the draw was open to navigation. That he was not very far west of the span towards the end of the bridge. That he thought he was one cord west of the middle of the bridge.

(Testimony of Louis H. Lucky.)

The witness here, at the request of defendant's counsel, pointed out on Defendant's Exhibit "C" the cord where he stood, making a cross there and lettered it "C." That witness had stated that he saw a man ahead of him before the witness stepped down to the cord, and that while witness was stepping down on to the cord and turning around the man disappeared. That he saw the man after that and that man was at one side and started to go ahead. The shadow interfered with him seeing. He did not know what happened to the man. That as the car approached him the man went into the shadow. That he heard the bell ringing just as he approached the bridge and heard the whistle just before he went on to the bridge. That he meant to tell counsel that after hearing the whistle and the bell ringing that he (witness) went on to the bridge and travelled over half the distance and that this [56] was what he meant to say. That the man he referred to in relation to his movements, when witness first saw the man on the side of the bridge, was when the man started to make for the end of the bridge. That this man was then going in the direction of the car—going towards the car.

**Testimony of Wm. Anderson, for Defendant.**

WM. ANDERSON, a witness on behalf of defendant, was sworn and testified as follows:

That he was the conductor on the motor car in question and had been such conductor since about the 20th of June of the year of the accident. That

(Testimony of Wm. Anderson.)

this same car had been operating prior to the injury on the run between Montesano and Hoquiam, since about the middle of June of the same year. That this car made two round trips between Montesano and Hoquiam, crossing the bridge four times a day. The schedule time of this car to leave in the evening from the Hoquiam station was six o'clock and this had been the schedule from the June previous. That it would take from three to five minutes for the car to get to the bridge from the Hoquiam station. That he was the conductor and was aboard the car at the time of the accident. That going up to the bridge and the span the car travelled at about seven or eight miles an hour. The bell was ringing. That the rules of the company required that before a car is started the bell must be rung and it was the custom to ring the bell continuously at that time on the car until it got past Posey's Mill, Ontario Avenue, and that this was away east of the bridge. That on the *vening* of the acident the bell was started ringing before the car started from the station at Hoquiam and that bell kept ringing continuously from that time until the car was [57] stopped on the bridge. That it was ringing after the car was stopped. That it was an automatic bell and was operated by air by turning a valve and would continue to ring until it was turned off. That it would be started by the engineer. That the whistle blew on this night about the time the car reached the semaphore. That he did not see anybody on the bridge before the car stopped. He



(Testimony of Wm. Anderson.)

was in the back portion of the car or passenger part of the car. The far part of the car contained the engine department where the engineer would be, immediately back of that was the express part and immediately behind the smoking and passenger department. That as to the stopping of the car he felt the air going into the emergency and the car seemed to stop immediately. He went to the front right away to ascertain the cause; that is, the front end of the car. The first man he saw after this was the engineer; he was coming down about the same time. That he looked to see if any person was there who appeared to be injured. That he met people on the bridge—a good many. That he talked with some of them. That he talked with every one he met or saw. That the result was that he could not make anybody understand what he wanted to know. That he asked them if they had seen anybody hit or that was hurt. That the headlight was burning brightly. That the rules of the company with reference to approaching the bridge and to blowing the whistle at the semaphore was that the crew of the car must call for the board and when the board was observed that car must answer. That the call was made first by four whistles and answered by two whistles. In other words four whistles asked the bridge-tender whether or not the car could cross, and two whistles would be when the bridge-tender [58] answered that the car could cross, and the car answered back, meaning all right I am proceeding ahead.

(Testimony of Wm. Anderson.)

On cross-examination by plaintiff's counsel the witness testified:

That he talked with Lucky that night. That he was away back in the back end of the car where the passengers were, taking up fares, and was not in where the motorman was—keeping any lookout on that bridge. That he did not know how many people were on the bridge and did not know anything about it until he got off and went out to the front portion of the car. That it was his business to know about the whistles, and his habit, and the rules of the company. That he had a present recollection that on the particular night four whistles were given for the bridge and that afterwards in response to the signal of the bridge-tender that two whistles were given. That he knew this because it was his business to know it. That there was something on that particular occasion that caused him to fix the circumstance in his mind. That he had crossed over that bridge before when people were on the bridge, many times. That he knew that employees on the east side of the river were in the habit of crossing over the bridge in going to and from their work. That they were working men so far as he knew. That he observed the extent of the headlight on the car, a distance to which an object could be seen by one standing in front of the car in the position of the motorman. That after the car would go into the straightaway—that is on to the straightaway as the car would approach the bridge the rays of the headlight were strong enough so that the motorman could *seen* per-

(Testimony of Wm. Anderson.)

son on the bridge all the way across. [59]

On redirect examination by defendant's counsel the witness testified. That this car could be seen by its headlight on a straight track 1000 feet at least. That the bell on the car was the ordinary regulation bell for the ordinary engine. That the bell could be heard when it was ringing a quarter of a mile at least and the whistle could be heard three-quarters of a mile. It was as loud or louder than a street-car whistle.

On recross-examination by plaintiff's counsel the witness testified:

That he had never given any thought to the matter as to whether at the hour of six o'clock at night he expected to find a large number of men on the bridge as he crossed over on his regular trips and never thought of people being there.

**Testimony of E. C. Taylor, on Behalf of Defendant.**

E. C. TAYLOR, called and sworn as a witness on behalf of defendant, testified:

That he was one of the operators of the motor-car mentioned. In charge of the baggage and express. That he had been on this car prior to the injury and ever since June of the same year. That the car started on this run between Hoquiam and Montesano about the middle of June of the same year, and it continuously operated on that run up to the time of the accident in November, making two round trips a day. That he remembered the incident of the car approaching the bridge on the night of the accident

(Testimony of E. C. Taylor.)

and the stopping of the car. That the car as it approached the bridge, going from the station to the bridge, he thought was moving at the rate of about six miles an hour. The car was moving at the [60] same rate when it was within fifty or seventy-five feet of the bridge. That when the car left Hoquiam station the bell started ringing and continued to ring until after the accident, and was ringing after the car had stopped. That he heard the whistle of the car before it got to the westerly approach of the bridge. That he heard this before the car struck the curve. That the rules of the defendant company, with reference to calling for the block or semaphore, were four short blasts of the whistle and if the block was given it would be answered by two short blasts of the whistle. The car had just got started on the bridge when it stopped. There was a small door between the baggage and the engine-room, he opened the door and looked inside and saw the engineer getting out. The witness then opened the baggage-car door and looked out on the side. That it was a dark and stormy night, wind blowing, and he could not see anything at all. In the course of two or three minutes, a short time, the engineer came around where the witness could speak to him and witness asked him what was the matter. Witness thought there was something the matter with the car. The engineer said that he believed a fellow had fallen off there. That witness could not get out of the car there because there was no girder to get out at that place, so he stayed in the baggage de-



(Testimony of E. C. Taylor.)

partment and did not see anything at all or anybody. That there was a small platform on the side of the bridge on the westerly end of the draw on the pier. That this platform, with reference to where the car stopped, would be just about the passenger entrance or middle of the car—and that this passenger entrance was about the middle of the car. This platform was on both sides. He thought the car was about 76 feet in length, that [61] after the car was stopped people came up. He tried to talk to one fellow shortly after the car had stopped, who came alongside of the car holding to the girder and that he could not get any reply out of him at all. That was the only person he saw that was close enough to talk to.

On cross-examination by plaintiff's counsel the witness testified:

That he knew that persons were in the habit of crossing the bridge in the night time only from the fact that he had seen people crossing there when the car was going through; that generally when the car crossed the bridge during the evening and on other occasions there would be other people crossing or about to cross the bridge. That he knew there were mill plants being operated on the east side of the river and that the men after leaving their work were in the habit of using the bridge for the purpose of going to the other side of the river where they lived. That the witness could not tell the distance that the train, if it were coming in his direction in the night-

(Testimony of E. C. Taylor.)

time, with the headlight burning, how fast that train was travelling towards him. That a car would look closer than it really was. That witness could tell within several hundred yards of how close the car was toward him as it was moving towards him. That one could tell closer than that, although not as well as he could in the day-time. That when a train comes on to a siding and the switches are all clear so another train can approach the headlights are blinded—indicating that the track is clear. That headlights are not blinded on account of the blindness of the headlight. That it was on account of the fact that it could not be told how far it is away if the car was going towards [62] the person or another train. That he thought the car was travelling at the time of the accident about six miles an hour. That he thought the car could be stopped within a distance of about ten feet at that rate of speed, and from the first time he observed the emergency being put on until the car stopped, it went about ten feet, and he did not think it exceeded that distance.

**Testimony of Wm. Anderson, on Behalf of  
Defendant, Recalled.**

Mr. ANDERSON, being recalled on behalf of plaintiff, testified that he thought when the car stopped, with reference to the platform on the west-erly end of the bridge, that the center of the bridge *was* where the passengers got off was right on the platform. That he got off right on the platform.

On cross-examination by plaintiff's counsel witness testified.

(Testimony of Wm. Anderson.)

That after the emergency was put on the car was stopped in not over ten feet. That it seemed to witness that it stopped at once, and that the car could be stopped within ten feet at the rate of speed it was going.

**Testimony of J. W. Dunn, on Behalf of Defendant.**

J. W. DUNN, called and sworn as a witness on behalf of defendant, testified as follows:

That he lived in Montesano and had lived there six years. That he had worked at Hoquiam about two years ago. That he worked at the Northwest and National Mills. That the Northwest was on the west side of the river and the National was immediately across the river on the easterly bank of the river. That he knew of the railroad bridge where the accident occurred and had crossed it. That he worked [63] at the National about two months or a little better and he crossed this bridge every evening going from work. That he generally crossed it about five minues after six. That he met the car referred to during the two months he was working at the places specified on the approach to the bridge. That he met it once just on the part that swings. Just once when it passed him. That he got off right in the middle of the platform. That there was a platform in the middle of the bridge. That he had seen other people crossing the bridge when the motor-car was crossing. That on such occasions some of them would get off on the side and hang on to the posts and some would get down below the ties and on to the steel girders, or whatever they called it

(Testimony of J. W. Dunn.)

there. Different positions along the bridge. That during the two months he had seen many people getting out of the way of cars and doing the things he mentioned at certain times.

Witness was then shown Defendant's Exhibit "H" and asked if he saw in that photograph a man standing on an iron plate. He stated that he did and that in his experience he had seen other people get into the same position. That he had also seen people stand on the ties and lean against the iron posts or iron beams. That a man would be out of danger if he could get down as the man is shown in the photograph, or if he stood on the end of the ties and leaned against the upright pieces. Under these circumstances he would not be in danger of being hit by the car. These places, he should judge, were about five or six feet apart, between the plate pieces.

On cross-examination by plaintiff's counsel witness testified:

That he worked on the side of the river he had been testifying [64] about, right after Thanksgiving. That he worked for the Northwest up until Thanksgiving, right after Thanksgiving he went to work at the National, in the year 1913.

**Testimony of A. L. Gabriel, on Behalf of Defendant.**

A. L. GABRIEL being called and sworn as a witness on behalf of defendant, testified:

That he resided at Bordeaux. That he resided at Hoquiam about six years, until up to last March. That he worked there for the Hoquiam Sash and



(Testimony of A. L. Gabriel.)

Door Co. and for the National Lumber & Box Co. That he worked for the National during the year 1912, and up until April, 1914. That he had occasionally crossed the bridge referred to. That during the winter, taking a period of a month of thirty days, it was safe to say he had crossed the bridge two weeks out of the month and this would include all of the winter period while he was working at the National, and generally crossed about six o'clock in the evening. That he knew of the motor-car or gas-car operating there from about the middle of June, 1913. That when he would meet the car he would step to one side and wait for it to get by. He would get down below the ties, if he met the car in the center, where the tower-man goes up in the tower. That at other times when he was not in the center of the bridge he had got out of the way of the car. That persons crossing the bridge at the same time this motor-car was crossing could get out of the way of the car and be in a place of safety. That they could do this either by leaning up against the uprights or by getting down on to the trestle below. That he had seen men crossing the bridge about six o'clock in the evening and meeting the car. That these men would do likewise. That he had seen a good many people [65] meet the trains while they were on the bridge, during his experience at the National. That he never knew of anyone being hurt. As a rule the gas-car was generally across before the witness went across. That the gas-car generally got across about five minutes past six. That this was

(Testimony of A. L. Gabriel.)

generally known among the working men and those living on the west side. That the man shown in the photograph, Defendant's Exhibit "H" was standing on the braces where they all would stand. That if a person met the car while crossing the bridge and got down in the position where that man was such person would be in no danger from the car. That if instead of getting down there a person should stand with his feet on the outer edge of the ties and lean up against the bridge-work or frame-work he would be out of danger there also. That there were several of these plates upon which the man was standing, as shown in the photograph, on each side of the bridge, but he did not know how many.

**Testimony of Thos. Steier, Witness on Behalf of Defendant.**

THOS. STEIER being called and sworn as a witness on behalf of defendant testified:

That he resided in Hoquiam and had resided there a little over nine years. Was working at the Eureka Mill. That he had worked at the National Mill from 1906 to 1911 and then went to work at the Eureka mill and had been working there ever since. The Eureka Mill was on the east side of the bridge, a little further down towards Aberdeen, or down the railroad track from the National, in the neighborhood of where the Coats Mill is, and right across from the Coats Mill. The railroad tracks run along close to the Coats Mill, Eureka, National and all of the mills. [66]

(Testimony of Thomas Steier.)

That during the period when the witness was working on the east side he was in the habit of crossing on foot this railroad bridge, using the bridge about twice a day, but did miss some days. That generally he would say he crossed the bridge at least once a day during the period of time he was working at Hoquiam. He crossed it in the morning about half past six, in the evening about five or ten minutes to six. That he knew the motor-car that ran across the bridge running between Hoquiam and Montesano. He had met it a number of times on the bridge. That when he met the car he would hold himself to the iron bars. That if one should meet the motor-car while he was on the bridge he could get into a place of safety by stepping onto the ties first and then he could step down to the trestle and be safe between the iron bars and that it would be safe if he put his feet on the outer edge of the ties and leaned up against the frame-work, if he hung himself out. That he had seen quite a few people undertaking to cross the bridge at the same time the motor-car was crossing. That these people to get out of danger, would do the same thing, step to one side of the ties or down to the trestles of the bridge. That he never knew of any person during all these years that he had been crossing there being hurt.

**Testimony of G. M. Rogers, on Behalf of  
Defendant.**

G. M. ROGERS, being called and sworn as witness on behalf of defendant testified:

Lived at Hoquiam and had lived there thirteen

(Testimony of G. M. Rogers.)

years or more. Occupation bridge tender for the N. P. Railroad. That this was the same bridge over which the Milwaukee and the defendant operates. That he had been constantly on that bridge all these years as operator. That he remembered the [67] time when the motor-car of the defendant company was supposed to have run into or hit a man on the bridge about two years ago. That he was there at the time he was supposed to have been hit. That his place on the bridge was in the tower-house or engine-room over the turning-gear in the center of the bridge. That is the trains run under the engine-room and under the position of the bridge-tender. He would be about 24 feet over the tracks. That at the time of the accident and for a period of some months prior to that time, in each day of 24 hours, there were 33 time-card trains. Then there was freight and one or two log trains which crossed twice a day, and the switch-engines. The number of switch engines would be very hard to estimate because they were very irregular. He had known them to make five round trips across the bridge during the day and once in awhile there would be a day when they would make two round trips. He would put in the neighborhood of about five single trips across there per day. That there would be in the neighborhood of thirty-five or forty trains that would cross the bridge during the day. That there was considerable traffic on the river and a great many boats passing up and down. That he knew of the semaphore, which was on the west of the bridge.



(Testimony of G. M. Rogers.)

That it was there during the time of the accident, but he could not give the date when it went into commission. The witness testified that he recognized the trespass sign shown on the photograph, Defendant's Exhibit "A," as one that was down there, and it was there at the time of the accident and was put up there a few months before that on the east end. That there was one on the west end, the same as that on the east. The one on the west end had been there the same length of time as the one on the east [68] end. That these signs were so plain that any person walking along the track or in the vicinity of the track could see them if they wanted to and that they were put up to be seen and read.

**Testimony of S. P. Walters, on Behalf of Defendant.**

S. P. WALTERS, being sworn as a witness on behalf of defendant, testified:

Lived at Puyallup and formerly lived at Hoquiam and was a bridge-tender at this bridge from May, 1909, to November, 1914. Was a bridge-tender at the time of the accident. That he never kept an account of the number of trains that crossed the bridge during 24 hours, immediately preceding and for a few months prior to the accident, but it would be considered between thirty and forty. That he knew of the semaphore on the westerly approach of the bridge. Its purpose was to signal trains to go ahead or stop. That this was done by a lever from the power-house. When it is ready for trains *to it* it is thrown into a perpendicular position by the bridge-

(Testimony of S. P. Walters.)

tender. That there was a light on the semaphore, also. A red and a green light. That this semaphore was put up there some time before the accident but he could not remember the date. That looking at Defendant's Exhibit "A," a photograph, he saw thereon the trespass or warning sign and recognized it. That there was a similar trespass sign on each approach to the bridge, east and west, being at each end of the bridge, or trestle-work. That he knew the one on the west end of the bridge was there at the time of the accident and supposed the other was there also, but that he did not see it because he did not live on that side and he very seldom was out there. [69]

**Testimony of G. M. Rogers, for Defendant,  
Recalled.**

G. M. ROGERS, being recalled, testified on behalf of defendant, as follows:

That there was at the time witness was testifying a couple of 1x10 planks or 1x12 boards in between the rails on the bridge. That these were put in for the use of the bridge-tenders, for their own use. The lumber belonged to the bridge-tenders and was put in by them, with their own work. This planking was laid in May or June, 1914. That there was nothing between the rails at the time of the accident, no planking and no tin. There was no planking there at all in 1913.

**Leon Benezra, Witness for Plaintiff, Recalled in Rebuttal.**

LEON BENEZRA, being recalled in rebuttal, on behalf of plaintiff, testified, that the deceased was a good swimmer. That he knew the deceased had been in swimming in this country, that he had been in swimming once with him in Hoquiam by the Lytle Mill, in the swimming hole there at Hoquiam.

**Testimony of Theo. Balabanas, Witness for Plaintiff, Recalled in Rebuttal.**

THEO. BALABANAS, being recalled in rebuttal, testified: That he saw deceased's dinner pail after he lost sight of deceased at the time of the accident. It was pounded over on one side. He meant by being pounded over on one side that it was knocked too much on one side or smashed.

On cross-examination the witness testified:

That on his direct examination the day previous there was no question asked him about the dinner pail. [70]

**Testimony of H. V. Dunlap, on Behalf of Plaintiff, in Rebuttal.**

H. V. DUNLAP was called and sworn as a witness on behalf of plaintiff, in rebuttal, and testified:

Business, bridge builder. Had been such between eighteen and twenty years. That he had had experience of being on bridge when cars lit by both electricity and acetylene were approaching. He was then asked by plaintiff's counsel the following question. What can you say upon the effect of a

(Testimony of H. V. Dunlap.)

person's judgment as to the distance a car is away from him, upon seeing the car approaching in the night-time with a light on? This was objected to as not proper rebuttal. The objection was sustained and an exception allowed plaintiff. [71]

Defendant, at the close of the testimony moved the Court, in writing, to instruct the jury to return a verdict against the plaintiff Bensoir Penso on the ground that the evidence was insufficient to submit the case to the jury; the motion being in the following language, omitting the title and signature:

**[Motions for Directed Verdicts.]**

"The evidence being in and both parties having rested the defendant now moves the Court to instruct the jury to return a verdict against the plaintiff Bensoir Penso on the ground that the evidence is insufficient to submit the case to the jury."

This motion was denied, defendant excepted to the ruling and the exception was allowed.

Defendant also, at the close of the testimony moved the Court, in writing, to instruct the jury to return a verdict against the plaintiff Esther Romi Penso on the ground that the evidence was insufficient to submit the case to the jury; the motion being in the following language, omitting the title and signature:

"The evidence being in and both parties having rested the defendant now moves the Court to instruct the jury to return a verdict against the plaintiff Esther Romi Penso on the ground that the evidence is insufficient to submit the case to the jury."



This motion was denied, defendant excepted to the ruling and the exception was allowed. [72]

### **Instructions.**

The Court then instructed the jury as follows:

Gentlemen of the Jury, you will take the pleadings in the case out to your jury-room with you. If you consult these they will show you exactly what the plaintiffs claim in bringing the suit, and exactly what defense the defendant has made to this action. You will have them with you in the jury-room at all times, and you may resort to them and find out just what are the issues in the case. But, briefly, the plaintiffs come into court and aver that one of them is the guardian of the son of this man who was killed and other the wife of the man who was killed. They aver that the deceased Penso was crossing the bridge used by the defendant company, and that for a long time before that this bridge had been permitted to be used and consented to be used by the defendant company, and that this deceased was there at the invitation of the company using it in crossing over this river, and that he was killed through the negligence of the defendant company in operating this car at too great speed over this bridge. Then the amount of damage is averred that came to this boy and this wife by reason of this death so wrongfully caused by the negligence of this defendant company.

The defendant denies that it was negligent and sets up that the deceased was guilty through his own negligence as described in the answer.

The plaintiffs then deny that the deceased was

himself negligent. These are the issues in the case.

[73]

A great deal has been said in the case regarding the right of the deceased on this bridge. You will understand that if anyone invites or consents to another person coming on its premises, that while they are on the premises there with such consent, either expressed or implied, that the owner of the premises or the occupant of the premises must exercise ordinary care to keep from injuring all those whom he would anticipate would be using the premises with such consent. Now, this consent may be either expressed or implied. You have a right to conclude that the defendant company consented to the use of this bridge by pedestrians going to and fro across this river, provided it had been for a long time openly and generally used by a large number of the public in so going to and fro across the bridge. Now, I said to you a moment ago that where a person consents to the use of the premises by the presence of persons on those premises, that the owner or occupant must exercise ordinary care to avoid injuring him, so that if you find that this deceased person was there by the consent of the defendant company, then the defendant company in the operation of its cars over the bridge was bound to use ordinary care to avoid injuring the deceased whom it thereby had reason to anticipate might be upon the bridge. As you are well aware, railroad cars must go over the track. There is no way for them to get off and go around anybody who is on the track. They have the right of way, and it is the business of pedestrians

that are using the railroad track for a footpath to use reasonable diligence to get out of the way and let the cars go by, because they cannot [74] go anywhere else, because they are large and cumbersome, and it is difficult to stop them. In that sense they have the right of way, but where the operators of a car have reason to anticipate that there may be pedestrians on the track, it is their duty to use reasonable diligence and reasonable and ordinary care to give warning of the approach of their car so that those pedestrians whom they have reason to anticipate are on the track may have reasonable opportunity to get out of the way, and if they fail to use ordinary care in the speed at which they operate the car, or the warnings which they give, or the lookout which they keep to advise those whom they may have reason to believe are using the way as a footpath, for them to get out of the way, they would be negligent.

The deceased man while using the footpath on the bridge, in going across this river, was bound to use ordinary care for his own safety, and if he failed to use ordinary care to keep or get out of the way of the approaching car, the plaintiffs in this case cannot recover even though you should find from a fair preponderance of the evidence that the defendant company, or its operatives, were negligent in the operation of the car.

Before the plaintiffs can recover in this case, they must establish by a fair preponderance of the evidence every material allegation in their complaint which is denied. Among those allegations in the

complaint which must be established by a fair preponderance of the evidence is first that one is the wife and the other the son of the man who, [75] was killed. Next, they must show that the defendant company was negligent in the manner which they allege in their complaint, and that that negligence was the proximate cause of the death of the deceased Penso. Another material allegation is the amount of the damage they claim to have suffered, or at any rate, that they did suffer some damage, that is, they must prove by a fair preponderance of the evidence that the continued life of the deceased Penso would have been a substantial benefit to them in a material sense.

In these instructions I have used the expressions, "preponderance of the evidence" and "proximate cause." Proximate cause is the moving, direct, efficient cause of an event, that cause which, moving in direct sequence, uninterrupted by any other efficient cause, produces a result.

The preponderance of the evidence, all I can say to you about that is that that evidence preponderates which is of such a nature, which so appeals to your experience and intelligence as to create and induce belief in your minds.

If a man in the operation of a car, the engineer in the operation of the car along the tracks, sees some one ahead of him that is in a place of safety, or who apparently has an opportunity to get out of the way of the car before it will make the point where he is, to get to a place of safety, he is not guilty of negligence in conducting his car along the track and tak-



ing it for granted that he will remain in a place of safety where he is, or will avail himself of that opportunity to get out of danger before the car [76] reaches him. Before he can be guilty of negligence, there must be something in the condition of the man, or the situation to advise him that if he continues with his car along the track, that the man is likely to be hurt. That instruction is given you in view of the testimony of the engineer that he did see the man. Of course, I have already advised you that it would be the duty if, under the instructions I had given you, the engineer had reason to anticipate that there would be men on this bridge, to keep a lookout, and that if he did not keep a lookout he would be negligent. That instruction is applicable to the testimony of the engineer that he did actually see this man.

The defendant, having alleged contributory negligence on the part of the deceased, which it is averred proximately contributed to his death, if you get to that phase of the case, the burden of establishing the deceased's negligence and that it proximately contributed to his death, rests upon the defendant.

The order in which you would naturally take up the consideration of these issues would be, first, to determine what, if any, relationship this boy and this woman bear to the deceased? If there is a fair preponderance of the evidence that one was the wife, and is to-day the widow, and that the other was the son, then the next step would be logically to deter-

mine whether the deceased himself contributed in any way proximately to his own death, by his own negligence. [77] If you find by a fair preponderance of the evidence that he did so, you would stop there and return a verdict for the defendant. If you find that he was not himself guilty of contributory negligence, you would then pass to the next point to determine whether the defendant, in any of the manners described in the complaint, was guilty of negligence, and whether it proximately contributed to the death of the deceased. If you find that the defendant was so negligent, by a fair preponderance of the evidence, you would then pass to what recovery should be awarded the plaintiffs in this case. In assessing the amount of recovery, you would not be influenced by any sentimental considerations and you would not allow any damage for merely grief, or injury to the feelings which may have resulted from the loss of the parent, or husband but you would confine your verdict to such an amount as would fairly compensate the plaintiffs in this cause for the death of the deceased Penso.

I have advised you about proximate cause. You will understand that if the deceased saw, or knew in any *what* that that car was coming, the failure to give a signal of the approach of the car would not be a proximate cause, because the only way in which failure to give a signal would be a proximate cause of the injury would be that if it had been given it would have warned the man of the approach of the car, but if he knew it, without a signal why it would not be necessary to warn him.

The Court will read to you certain instructions which have been prepared, and in so far as they may be repetition of what I have already told you, you are not to conclude that the Court is bearing down upon one portion of [78] this case, thereby seeking to impress you with its importance over those which are not repeated.

If you believe that the public were accustomed to travel over this bridge, then the fact that company posted no trespass signs would not absolve the company from its duty to use reasonable care in the operation of its cars, if it knew that persons still continued to walk on its tracks over the bridge, as had been the custom before the notices were posted, and for a considerable time prior to the accident.

You are instructed that there is no issue as to whether or not the engineer and crew in charge of the car was competent or not. You cannot base any negligence on the defendant company upon the assumption, or find that incompetent men were employed by the company.

You are instructed that under the evidence in this case the bridge in question was private property of the Northern Pacific Railway Company, and was used by the defendant, and if it be a fact that the bridge was over navigable waters and extended between the ends of streets in the city of Hoquiam, did not give the deceased or the public any greater rights over or upon the bridge than if the bridge had been entirely upon and joining on private property.

But if you find that at the time of the accident the defendant company was negligently operating its

cars, you are instructed that it would not then be liable in this action if the person injured or killed, if that were the fact, was guilty of failing to use ordinary care and caution to protect himself, and if he in any way contributed by his own negligence or carelessness to the injuries, even though [79] you find that the employes of the railroad company were negligent.

You are instructed that the fact, if it is a fact, that the deceased referred to in the testimony was a foreigner, or of a nationality other than that of the United States in no way *affect* any issues in this case. He is to be judged in his act by the same standard that governs the conduct of all persons in the exercise of their senses, using that precaution which ordinary prudent men would use under like circumstances.

You are instructed that the law does not require a railroad company to stop its trains simply because there are travelers upon its tracks. The mere fact that a person is seen walking in front of a train, in the direction of a moving engine, is not, as a matter of law, required to bring its car or train to a stop.

It is as much the duty of the pedestrian traveling along a highway or any place used as a highway to use his sight and hearing, as it is for the engineer of an approaching train to keep a lookout for danger, and if the engineer of the car saw the plaintiff walking in the ordinary and customary way upon the track, it was not the duty of the engineer to stop the car on account thereof, but he had the right to assume that the party walking upon the tracks, as dis-



closed by the evidence, would himself get out of the way of the approaching train or car, unless there was something in the situation to advise the engineer that it would be unsafe to do so.

The railroad company is not an insurer against injuries, and negligence must be shown of some character before [80] a railroad company can be held liable for killing or injuring a traveler. It is not sufficient to find that the traveler was injured or killed. The burden of proof is upon the plaintiff in this action in this connection.

That plaintiffs herein are not entitled to a verdict at your hands unless you believe from a fair preponderance of the evidence that the deceased, Haim Jack Penso, met his death at the proximate result of negligence on the part of the defendant railroad company. If you believe from a fair preponderance of the evidence that the defendant was not guilty of negligence which was the proximate cause of the said Penso's death, then, of course, your verdict must be for the defendant. On the other hand, if you believe from a fair preponderance of the evidence that the defendant was negligent in the operation of its train, and you further believe from a fair preponderance of the evidence that the said deceased was also negligent, and that the negligence of both the said defendant and the said deceased contributed to the death of said Penso, then, under those circumstances, the plaintiffs would not be entitled to a verdict, but your verdict, on the contrary, should be for the defendant. Plaintiffs are not entitled to a verdict at your hands if you are satisfied from a fair

preponderance of the evidence that the said deceased was guilty of such negligence as proximately contributed to his own damage.

The jury is not permitted to guess or speculate as to how the deceased met his death. Before you can return any verdict in favor of plaintiffs, the testimony must show you the manner in which the deceased was killed, and that such death was the result of the negligence of the defendant. [81] The jury must not return a verdict herein based upon testimony which to the mind of the jury shows that the deceased might have been injured in this way or that way, or in this manner, or that manner, but the testimony must satisfy the mind of the jury as to how such accident happened, and what was the manner and cause of such death.

In these instructions I have several times used the expression "ordinary care," and "negligence." Negligence, in the sense in which it has been used in these instructions, means the want of ordinary care, Ordinary care means the care an ordinarily careful and prudent person would use under the same circumstances, and should always be proportioned to the peril or danger reasonably to be apprehended from the want of proper prudence.

You are in this case, as in every case where questions of fact are submitted to a jury for determination, the sole and exclusive judges of every question of fact in the case. This would include all of those issues of fact which I have submitted to you, and the weight of the evidence and the credibility of the witnesses. In weighing the evidence and determin-

ing what credibility should be given each of the witnesses who have come before you and testified, you should take into account the manner in which they gave their testimony, their appearance and demeanor upon the witness-stand, whether they carried to your minds the belief that they were trying to tell you the exact truth of what they had seen or heard, or whether they were reluctant, kept back something, or whether, on the other hand they were too willing, running along and volunteering testimony about which no questions were asked. [82]

You will take into account the testimony of each witness, whether it appears to be a total and complete story, whether it is reasonable, whether you would expect it to be corroborated, if true, or whether it is contradicted.

You will view the testimony of each witness who came before you from at least two points, that is the opportunity the witness had to tell you the whole truth about which he testified, and then whether he wanted to tell you all of the truth. One witness may be much more favorably situated than any other to know all about what happened, or to see the disputed transactions, and others may be equally positive about it, may be equally honest, but had not the same opportunity to see just what happened. You will also take into account any interest any witness may have in this case, either by the manner in which he gave his testimony or by his relation to the case. [83]

Before the Court instructed the jury, and at the

proper time, the defendant requested, in writing, the Court to give certain instructions to the jury.

**[Instructions Requested by Defendant.]**

The instructions asked for by defendant, which were not given by the Court were as follows:

1. "You are instructed to return a verdict in this case for the defendant. Under the testimony the evidence does not justify a rendition of a verdict against the defendant." Which instruction was refused by the Court, the defendant excepted thereto and the exception was allowed.

2. "You are instructed that you cannot return a verdict in favor of the plaintiff Esther Romi Penso, widow of the alleged deceased, in any event. Which instruction was refused by the Court, the defendant excepted thereto and the exception was allowed.

3. You are instructed that as to the plaintiff Ben-soir Penso, the alleged minor, you cannot return any verdict in his favor for any damages whatsoever, nor in favor of his guardian *ad litem*. The evidence is insufficient to justify any verdict of the jury in his favor, or any allowance of damages in connection therewith." Which instruction was refused by the Court, the defendant excepted thereto and the exception was allowed.

4. "In view of the fact that all the testimony discloses that the engine in question was lighted by a headlight that could be seen for a long distance you are instructed that the question whether the bell was rung or not on the car just prior to the accident is immaterial in this case and you cannot find any neg-



ligence based upon the fact that the bell was not rung." Which instruction was refused by [84] the Court, defendant excepted thereto and the exception was allowed.

5. "Likewise the same is true as to whether there was a warning given by whistle or not." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

8. "You are instructed that the evidence shows that the deceased, for whose death this action is brought, was guilty of contributory negligence and your verdict must be for the defendant." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

11. "It is as much the duty of the pedestrian traveling along a highway or any place used as a highway to use his sight and hearing, as *it for* the engineer of an approaching train to keep a lookout for danger, and if the engineer of the car saw the plaintiff walking in the ordinary and customary way upon the track, it was not the duty of the engineer to stop the car on account thereof, but he had the right to assume that the party walking upon the tracks, as disclosed in the evidence, would himself get out of the way of the approaching train or car." [85]

12. "You are instructed that the fact that the party claimed to have been killed for a long period of time prior to the accident travelled in the morning to his work over a right of way and bridge across the river at some distance from where this railroad bridge was operated is a circumstance which you should consider in determining whether the alleged

deceased was guilty of contributory negligence. The testimony discloses that he could go to his work, and did go to his work in the morning by a route over which there were no trains operated, and this being so you have a right to take this circumstance into consideration in determining whether he was guilty of contributory negligence in going upon the bridge where it is claimed he was killed.” Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

14. “That the fact that the said Penso, whom it is claimed was killed, could not read or write the English language or any language is not a circumstance which you shall consider in determining the question of negligence on the part of the company or the question of his contributory negligence.” Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

17. “If you believe from a fair preponderance of the evidence that at or prior to the time the deceased undertook to cross the bridge in question, he knew, or by the exercise of reasonable care and caution should have known, that one of the defendant’s cars or trains would be crossing such bridge at the same time that the [86] deceased would be crossing it, then the deceased would be guilty of such contributory negligence and assumption of risk, as that the plaintiffs could not recover herein, and your verdict should be for the defendant. In this connection you should take into consideration whether or not the schedule time for the said motor car to cross the said said bridge was about six o’clock, and whether or

not the defendant habitually so operated its said motor-car across such bridge at such time, and whether the deceased knew, or by the exercise of reasonable care and caution could have known, that the said defendant would be running the said motor car across the said bridge at the same time the deceased undertook to pass over it at the time of the injury, then, and under those circumstances, the deceased would be guilty of both assumption of risk and contributory negligence, and the plaintiffs could not recover and your verdict should be for the defendant. If you believe that the deceased knew, or should have known, that he would meet the said motor-car on such bridge at the same time he undertook to cross over the same, the deceased would be guilty of such negligence as would preclude any recovery by the plaintiffs herein, and this regardless of the fact as to whether or not the defendant was guilty of negligence." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

18. "The fact that the bridge in question spans the river at a prolongation of one of the streets in the city of Hoquiam could not in any manner or way affect the duties or obligations [87] of either or of any of the parties hereto." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

19. "You are instructed that if you believe from the evidence that the deceased saw, or by the exercise of reasonable care and caution could have seen, that the motor-car was approaching the bridge, or

was coming on the same, and you further believe that the deceased could at that time have gotten into a place of safety on such bridge and thus avoided being injured, then the deceased would be guilty of negligence contributing to his own injury and your verdict must be for the defendant." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

20. "If you believe from the evidence that it was dangerous to undertake to cross over the said bridge at the same time a car or train was crossing over the same and you further believe that the deceased, immediately prior to going on the said bridge, knew or by the exercise of reasonable care should have known that he would meet the said motor-car or other car or trains on such bridge, if he undertook to cross the same at the time he did undertake to cross, then the deceased would be guilty of such contributory negligence and assumption of risk as would defeat any recovery for the plaintiffs herein, and under those circumstances your verdict must be for the defendant." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

Instruction No. 11, asked for by defendant, above-mentioned, was given as asked, but the Court at the end of the [88] instruction *the Court* added the following modification thereto: "Unless there was something in the situation to advise the engineer that he would be unable to do so." To this modification by the Court the defendant excepted, upon the ground that the modification was inapplicable to



the facts; the undisputed testimony showing that there was nothing in the situation or circumstances of the case that would tend to so advise the engineer.

The above exceptions to the refusal of the Court to give instructions were all taken and allowed at the proper time before the retirement of the jury.

The defendant, after the Court's instructions were given, in the presence of the jury and before it retired, made the following exceptions to the Court's charge:

**[Exceptions to Instructions.]**

Defendant excepted to all that part of the Court's charge which reads as follows:

"The order in which you would naturally take up the consideration of these issues would be, first, to determine what, if any, relationship this boy and this woman bear to the deceased. If there is a fair preponderance of the evidence that one was the wife and is to-day the widow, and that the other was the son, then the next step would be logically to determine whether the deceased himself contributed in any way proximately to his own death, by his own negligence." Upon the ground that no damages could be awarded to the minor; and also upon the grounds that damages could not be united in one verdict for both plaintiffs jointly.

The defendant also excepted to all that part of the Court's instructions which read as follows: [89]

*Defendant also excepted to all that part of the Court's instructions which reads as follows:*

"If you find that the defendant was so negligent, by a fair preponderance of the evidence, you would

then pass to what recovery should be awarded the plaintiffs in this case. In assessing the amount of recovery, you would not be influenced by any sentimental consideration, and you would not allow any damage for merely grief, or injury to the feelings which may have resulted from the loss of the parent, but you would confine your verdict to such an amount as would fairly compensate the plaintiffs in this cause for the death of the deceased Penso." Upon the ground that no damages could be awarded to the minor, in any event, under the proof in the case; also upon the ground that damages could not be united in one verdict for both plaintiffs jointly. The exceptions were allowed.

After the instructions were given and the exceptions taken as aforesaid the jury retired and thereafter on October 28, 1915, returned a verdict in favor of plaintiffs, and assessed their damages at the sum of \$2,500; the verdict, omitting the title and signatures being as follows:

We, the jury impaneled in the above-entitled cause, find for the plaintiffs and assess their damages at the sum of Twenty-five Hundred Dollars (\$2,500).

[90]

Service of the within and foregoing bill of exceptions prepared and proposed by defendant is admitted at Hoquiam, Washington, this 4th day of December, 1915.

MORGAN & BREWER and  
A. EMERSON CROSS,

Attorneys for Plaintiff.

(Filed Dec. 7, 1915.) [91]

**Order Settling Bill of Exceptions.**

On this 20th day of December, 1915, the above-entitled cause coming on to be heard upon application of defendant to settle a bill of exceptions in said cause and in accordance with stipulation and order of the Court heretofore made, and it appearing to the Court that the bill exceptions was duly served on the attorneys for plaintiff within the time provided by law and that the attorneys for plaintiff have suggested amendments thereto, which amendments have been accepted by the defendant and have been incorporated in the bill of exceptions, and all the parties consenting to the settling of the same and that the time for settling said bill of exceptions has not expired; the same having been extended from time to time by stipulation and order of the Court for the reason that additional time has been required and

It further appearing to the Court that the bill of exceptions contains all the facts occurring in the trial of said cause, together with the exceptions thereto, and all the matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of the bill of exceptions and the clerk of this court is [92] hereby instructed to properly mark and identify such exhibits and attach the same thereto, and in case it is inconvenient and not practicable to attach any exhibit or exhibits to properly identify it or them in the cause and to forward them as a part of the bill of exceptions.

Thereupon, upon motion of the defendant, Oregon-Washington Railroad & Navigation Co., it is.

ORDERED that said proposed bill of exceptions be and is hereby settled as a true bill of exceptions in said cause and that the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a true, full and correct bill of exceptions and the clerk is hereby ordered to file the same as the record in said cause and to transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,  
Judge.

(Filed Dec. 20, 1915.) [93]

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### **Order Allowing Writ of Error.**

On motion of the defendant it is hereby ordered that a writ of error is hereby allowed as prayed for in the petition for writ of error filed herein to have the said cause reviewed in the United States Circuit Court of Appeals for the Ninth Circuit and a writ of error and citation is hereby directed to be issued and certified transcript of the record, testimony, exhibits, stipulations and all proceedings be transmitted to said Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed at the sum of Four Thousand Dollars, the same to act as a supersedeas bond and also as a bond for costs and damages on the appeal.



Dated this 5th day of January, 1916.

EDWARD E. CUSHMAN,  
Judge.

(Filed Jan. 5, 1916.)    [94]

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**Assignment of Errors.**

Comes now the Oregon-Washington Railroad & Navigation Company, a corporation, defendant above named, and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above case from the judgment made and entered by this Honorable Court on the 1st day of November, 1915.

The Court erred in permitting plaintiffs to offer in evidence a certified copy of the plat of Hoquiam Tide and Shore Lands and the dedication thereof, as made by the Commissioner of Public Lands of the State of Washington, for the purpose of showing the nature of the street over which the railroad ran and upon which the bridge mentioned in the complaint was located, being Plaintiff's Exhibit I; which exhibit was introduced in evidence over the objection of defendant; objections being upon the ground that the same was immaterial and it made no difference whether the bridge was a prolongation of the street or not.    [95]

2.

The Court erred in admitting in evidence plaintiffs' Exhibit II, being a certified copy of the rededication of the same lands referred to in the last objection by the same office; being plat No. 2, Hoquiam

Tide and Shore Lands and purporting to show the railroad bridge in question; over the objections of defendant; objections being upon the same ground as made in the preceding assignment of error.

## 3.

The Court erred in admitting in evidence Plaintiffs' Exhibit III, being ordinance No. 70 of the City of Hoquiam granting a franchise to the railway company to operate over this street; over the objections of counsel for defendant, which were upon the ground that it was immaterial.

## 4.

The Court erred in admitting in evidence Plaintiffs' Exhibit IV, being the proceedings of the city council of the city of Hoquiam, showing the transfer of the ordinance above referred to to the Northern Pacific Railway Company, over the objection of defendant's counsel that it was immaterial.

## 5.

The Court erred in overruling, at the close of plaintiffs' testimony the motion of defendant for a nonsuit, which motion was based upon the grounds that the evidence was insufficient to show negligence on the part of the defendant company; also upon the ground that the evidence showed that the deceased was guilty of contributory negligence, also that it was not shown that deceased and Esther Romi Penso were husband and wife, or that either of the plaintiffs [96] were dependent upon the deceased for support.

## 6.

The Court erred in refusing to instruct the jury to return a verdict against the plaintiffs at the close of all the testimony, upon the motion of the defendant; which motion was based upon the ground that the evidence was insufficient.

## 7.

The Court erred in refusing to instruct the jury, in writing, at the close of the testimony, upon the motion of the defendant, to return a verdict against the plaintiff Esther Romi Penso upon the ground that the evidence was insufficient to justify a recovery.

## 8.

The Court erred in refusing to instruct the jury, in writing, at the close of the testimony, upon the motion of the defendant, to return a verdict against the plaintiff Bensoir Penso upon the ground that the evidence was insufficient to justify a recovery.

## 9.

The Court erred in refusing to give instruction No. 1, at the request of defendant, which instruction is as follows: "You are instructed to return a verdict in this case for the defendant. Under the testimony the evidence does not justify a rendition of a verdict against the defendant."

## 10.

The Court erred in refusing to give instruction No. 2, at the request of the defendant, which instruction is as follows: "You are instructed that you cannot return a [97] verdict in favor of Esther Romi

Penso, widow of the alleged deceased, in any event.

11.

The Court erred in refusing to give instruction No. 3, at the request of defendant, which instruction is as follows: "You are instructed that as to the plaintiff Bensoir Penso, the alleged minor, you can not return any verdict in his favor for any damages whatsoever, nor in favor of his guardian *ad litem*. The evidence is insufficient to justify any verdict of the jury in his favor, or any allowance of damages in connection therewith."

12.

The Court erred in refusing to give instruction No. 4, at the request of the defendant, which instruction is as follows: "In view of the fact that all the testimony discloses that the engine in question was lighted by a headlight that could be seen for a long distance you are instructed that the question whether the bell was rung or not on the car just prior to the accident is immaterial in this case and you can not find any negligence based upon the fact that the bell was not rung."

13.

The Court erred in refusing to give instruction No. 8, at the request of the defendant, which instruction is as follows: "You are instructed that the evidence shows that the deceased, for whose death this action is brought, was guilty of contributory negligence and your verdict must be for the defendant."

14.

The Court erred in refusing to give instruction



No. 11, at the request of the defendant, which instruction is as follows: "It is as much the duty of the pedestrian traveling [98] along a highway or any place used as a highway to use his sight and hearing, as it is for the engineer of any approaching train to keep a lookout for danger, and if the engineer of the car saw the plaintiff walking in the ordinary and customary way upon the track, it was not the duty of the engineer to stop the car on account thereof, but he had the right to assume that the party walking upon the tracks, as disclosed by the evidence, would himself get out of the way of the approaching train or car."

## 15.

The Court erred in refusing to give instruction No. 12, at the request of the defendant, which instruction is as follows: "You are instructed that the fact that the party claimed to have been killed for a long period of time prior to the accident traveled in the morning to his work over a right of way and bridge across the river at some distance from where this railroad bridge was operated is a circumstance which you should consider in determining whether the alleged deceased was guilty of contributory negligence. The testimony discloses that he could go to his work, and did go to his work in the morning by a route over which there were no trains operated, and this being so you have a right to take this circumstance into consideration in determining whether he was guilty of contributory negligence in going upon the bridge where it is claimed he was killed."

## 16.

The Court erred in refusing to give instruction No. 14, at the request of the defendant, which is as follows: "That the fact that the said Penso, whom it is claimed was killed, [99] could not read or write the English language or any language is not a circumstance which you shall consider in determining the question of negligence on the part of the company or the question of his contributory negligence."

## 17.

The Court erred in refusing to give instruction No. 17, at the request of the defendant, which instruction is as follows: "If you believe from a fair preponderance of the evidence that at or prior to the time the deceased undertook to cross the bridge in question, he knew, or by the exercise of reasonable care and caution should have known, that one of the defendant's cars or trains would be crossing such bridge at the same time that the deceased would be crossing it, then the deceased would be guilty of such contributory negligence and assumption of risk, as that the plaintiffs could not recover herein, and your verdict should be for the defendant. In this connection you should take into consideration whether or not the schedule time for the said motor-car to cross the said bridge was about six o'clock, and whether or not the defendant habitually so operated its said motor-car across such bridge at such time, and whether the deceased knew, or by the exercise of reasonable care and caution could have known, that the said defendant would be run-

ning the said motor-car across the said bridge at the same time the deceased undertook to pass over it at the time of the injury, then, and under those circumstances, the deceased would be guilty of both assumption of risk and contributory negligence, and the plaintiffs could not recover and your verdict should be for the defendant. If you believe that the deceased knew, or should have known, that he would meet [100] the said motor-car on such bridge at the same time he undertook to cross over the same, the deceased would be guilty of such negligence as would preclude any recovery by the plaintiffs herein, and this regardless of the fact as to whether or not the defendant was guilty of negligence.”

## 18.

The Court erred in refusing to give instruction No. 18, at the request of defendant, which instruction is as follows: “The fact {that the bridge in question spans a river at a prolongation of one of the streets in the city of Hoquiam could not in any manner or way affect the duties or obligations of either or any of the parties hereto.”

## 19.

The Court erred in refusing to give instruction No. 19, at the request of defendant, which instruction is as follows: “You are instructed that if you believe from the evidence that the deceased saw, or by the exercise of reasonable care and caution could have seen, that the motor-car was approaching the bridge, or was coming on the same, and you further believe that the deceased could at that time have gotten into a place of safety on such bridge and

thus avoided being injured, then the deceased would be guilty of negligence contributing to his own injury and your verdict must be for the defendant.

## 29.

The Court erred in refusing to give instruction No. 20, at the request of the defendant, which instruction is as follows: "If you believe from the evidence that it was dangerous to undertake to cross over the said bridge at the same time a car or train was crossing over the same and you [101] further believe that the deceased, immediately prior to going on the said bridge, knew or by the exercise of reasonable care should have known that he would meet the said motor-car or other car or trains on such bridge, if he undertook to cross the same at the time he did undertake to cross, then the deceased would be guilty of such contributory negligence and assumption of risk as would defeat any recovery for the plaintiffs herein, and under those circumstances your verdict must be for the defendant."

## 21.

The Court erred in modifying instruction No. 1, above set forth, by adding and giving to the jury, the following, as a part thereof: "Unless there was something in the situation to advise the engineer that he would be unable to do so."

## 22.

The Court erred in giving to the jury the following instruction: "The order in which you would naturally take up the consideration of these issues would be, first, to determine what, if any, relationship this boy and this woman bear to the deceased. If there



is a fair preponderance of the evidence that one was the wife and is to-day the widow, and that the other was the son, then the next step would be logically to determine whether the deceased himself contributed in any way proximately to his own death, by his own negligence." For the reason that no damages could be awarded to the minor, and also that damages could not be united in one verdict for both plaintiffs jointly. [102]

## 23.

The Court erred in giving the jury the following instruction: "If you find that the defendant was so negligent, by a fair preponderance of the evidence, you would then pass to what recovery should be awarded the plaintiffs in this case. In assessing the amount of recovery, you would not be influenced by any sentimental consideration, and you would not allow any damage for merely grief, or injury to the feelings which may have resulted from the loss of the parent, but you would confine your verdict to such an amount as would fairly compensate the plaintiffs in this cause for the death of the deceased Penso." For the reason that no damages would be awarded to the plaintiffs in any event under the proof in this case, and also that damages could not be united in one verdict for both plaintiffs jointly.

## 24.

The Court erred in rendering judgment in the case

in favor of the plaintiffs.

J. B. BRIDGES,

BRIDGES & BRUENER,,

BOGLE, GRAVES, MERRITT &  
BOGLE,

SULLIVAN & CHRISTIAN,

Attorneys for Defendant and the Plaintiff in  
Error.

(Filed Jan. 5, 1916.) [103]

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**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:

That the Oregon-Washington Railroad & Navigation Company, a corporation, and National Surety Company, a corporation, are held and firmly bound unto the above-named Esther Romi Penso and Bensoir Penso in the sum of Four Thousand Dollars for the payment of which well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 5th day of January, 1916.

Whereas, the above-named Oregon-Washington Railroad & Navigation Company, a corporation, has prosecuted a writ of error to reverse the judgment of said District Court, rendered on the 1st day of November, 1915, in favor of said Esther Romi Penso and Bensoir Penso and against the said Oregon-Washington Railroad & Navigation Company, a corporation, for the recovery of the sum of Twenty-five Hundred Dollars.

NOW, THEREFORE, THE CONDITION OF THIS BOND is such that if the above-named Oregon-Washington Railroad & Navigation Company, a corporation, shall prosecute said writ of error to effect and answer all damages and costs if it fail [104] to make said appeal good this obligation shall be void, otherwise same shall remain in full force and virtue.

OREGON-WASHINGTON RAILROAD &  
NAVIGATION COMPANY.

By J. B. BRIDGES,  
BRIDGES & BRUENER,  
SULLIVAN & CHRISTIAN,

Its Attorneys.

NATIONAL SURETY COMPANY. (Seal)

By R. E. MAHAFFAY,  
Resident Asst. Secretary.

By R. E. EVANS,  
Resident Vice-President.

The above bond is hereby approved as a cost and supersedeas bond this 5th day of January, 1916.

EDWARD E. CUSHMAN,  
District Judge.

Doc. Int. Rev. stamps affixed.

(Filed Jan. 5, 1916.) [105]

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**Stipulation as to the Original Exhibits.**

It is hereby stipulated between the plaintiff and defendants that the original exhibits introduced in evidence in the trial of the cause in the court below may be transmitted to the Court of Appeals with the

transcript of the record in lieu of copies; most of the exhibits being photographs and diagrams requiring an inspection of the original exhibit.

If is further stipulated that the Judge who tried the cause in the court below may make an order to this effect.

J. B. BRIDGES,  
BRIDGES & BRUENER,  
SULLIVAN & CHRISTIAN,  
Attorneys for Plaintiff in Error.  
MORGAN & BREWER and  
A. EMERSON CROSS,

Attorneys for Defendants in Error.

(Filed Jan. 12, 1916.) [106]

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**Order Directing Original Exhibits Instead of Copies  
to be Forwarded to the Circuit Court of Appeals.**

Now, on this 12th day of January, 1916, upon stipulation of the respective parties, through their attorneys, and it appearing that the original exhibits will be needed for inspection upon the hearing of the writ of error, it is hereby

ORDERED that the clerk of this court transmit to the Circuit Court of Appeals, either by attaching to the bill of exceptions, or by otherwise forwarding, properly identified, the original exhibits introduced in evidence in the trial of this cause.

EDWARD E. CUSHMAN,  
Judge.

(Filed Jan. 13, 1916.) [107]



**Stipulation [Relating to Transcript].**

It is hereby stipulated by and between the respective parties that the transcript on appeal made by the clerk of the District Court may omit therefrom the caption, excepting on the complaint, with all endorsements, verifications and acceptances of service.

J. B. BRIDGES,  
BRIDGES & BRUENER,  
SULLIVAN & CHRISTIAN,  
Attorneys for Plaintiff in Error.  
MORGAN & BREWER and  
A. EMERSON CROSS,  
Attorneys for Defendants in Error.

(Filed Jan. 12, 1916.) [108]

**Admission of Service [of Order Allowing Writ of Error, etc.].**

We hereby admit service upon plaintiffs of the following papers filed in the clerk's office of the United States District Court for the Western District of Washington, Southern Division, in the [above-entitled action, on the 5th day of January, 1916.

Order allowing writ of error to be prosecuted, and fixing the amount of bond.

Supersedeas and cost bond on writ of error.

Assignment of errors.

Dated this 8th day of January, 1916.

MORGAN and BREWER, and  
A. EMERSON CROSS,

Attorneys for Plaintiffs.

(Filed Jan. 12, 1916.) [109]

[Certificate of Clerk U. S. District Court to  
Transcript of Record.]

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the above-entitled cause, to wit; Esther Romi Penso and Bensior Penso by his guardian *ad litem* Leon Benezra, vs. Oregon-Washington Railroad & Navigation Company, a corporation, as the same remains of record and on file in my office, in said District, at Tacoma, and that the same is made pursuant to praecipe of counsel filed herein, and the same constitutes my return on the annexed writ of error.

I further certify and return that I hereto attach and herewith transmit the original writ of error and original citations, with original acceptances of service thereon, and original prayer for reversal; and that under separate cover I am certifying the original exhibits as per stipulation of counsel.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit:

Clerk's fees (Sec. 828 R. S. U. S.) for making

record, certificate and return, 283 folios,

@ 15¢..... 42.45

Certificate of clerk to transcript of record, 3	
folios @ 15¢ each.....	.45
Seal to said certificate.....	.20
Certificate and seal as to the original exhibits,	
1 folio.....	.25

[110]

ATTEST MY OFFICIAL SIGNATURE and the  
seal of the said United States District Court for the  
Western District of Washington, at Tacoma, this  
18th day of January, A. D. 1916.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy Clerk. [111]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

OREGON-WASHINGTON RAILROAD & NAVI-  
GATION COMPANY, a Corporation,  
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO,  
by His Guardian *ad Litem*, LEON BEN-  
EZRA,

Defendants in Error.

**Writ of Error [Original].**

United States of America,—ss.

The President of the United States of America to  
the District Court of the United States for the  
Western District of Washington, Southern Di-  
vision, Greeting:

Because in the record and proceedings, as also in the  
rendition of the judgment before you between said  
Esther Romi Penso and Bensoir Penso, by his guard-  
ian *ad litem* Leon Benezra, plaintiffs, and Oregon-  
Washington Railroad & Navigation Company, a cor-  
poration, defendant, a manifest error hath happened  
to the great damage of said Oregon-Washington  
Railroad & Navigation Company, we being willing  
that such error, if any hath happened, should be  
duly corrected, and full and speedy justice done to  
the defendant aforesaid, in this behalf do command  
you, if judgment be therein given, that then, under  
your seal, distinctly and openly, you send the rec-  
ord and proceedings aforesaid, with all things con-  
cerning the same, to the Justices of the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit, at the courtrooms of said court in the city of  
San Francisco, State of California, together with  
this writ, so that you have the [112] same at said  
place, before the Justices aforesaid, on or before  
the 3d day of February, 1916; that the record and  
proceedings aforesaid being inspected, the said Jus-  
tices of the said Circuit Court of Appeals may cause  
further to be done therein, to correct that error,



what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 5th day of January, 1916, and of the Independence of the United States the one hundred and fortieth.

[Seal]

FRANK L. CROSBY,  
Clerk of the District Court of the United States for  
the Western District of Washington.

By E. C. Ellington,  
Deputy Clerk.

The foregoing writ is hereby allowed this 5th day of January, 1916.

EDWARD E. CUSHMAN,  
Judge. [113]

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. *Oregon-Washington Railroad & Navigation Company*, a Corporation, Plaintiff in Error, vs. *Esther Romi Penso et al.*, Defendants in Error. Writ of Error.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

OREGON-WASHINGTON RAILROAD & NAVI-  
GATION COMPANY, a Corporation,  
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO,  
by His Guardian *ad Litem*, LEON BEN-  
EZRA,

Defendants in Error.

**Citation [Original].**

United States of America,—ss.

To Esther Romi Penso and Bensoir Penso:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States District Court for the Western District of Washington, Southern Division, wherein Oregon-Washington Railroad & Navigation Company, a corporation, is plaintiff in error and you are the defendants in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE,  
Chief Justice of the United States, the 5th day of  
January, in the year of our Lord one thousand nine  
hundred and sixteen, and of the Independence of  
the United States the one hundred and fortieth.

[Seal]

EDWARD E. CUSHMAN,  
District Judge. [114]

Service of the within citation is hereby acknowl-  
edged, by receipt of copy, this 5th day of January,  
1916.

~~EDWARD E. CUSHMAN,~~  
Attorneys for Defendants in Error. [115]

[Endorsed]: No. ——. In the United States Cir-  
cuit Court of Appeals for the Ninth Circuit. Ore-  
gon-Washington Railroad & Navigation Company,  
a Corporation, Plaintiff in Error, vs. Esther Romi  
Penso et al., Defendants in Error. Citation.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

OREGON-WASHINGTON RAILROAD & NAVI-  
GATION COMPANY, a Corporation,  
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO,  
by His Guardian *ad Litem*, LEON BEN-  
EZRA,

Defendants in Error.

**Admission of Service [of Citation and Writ of Error].**

We hereby admit service upon us in the Western District of Washington, Southern Division, on the 8th day of January, 1916, of the citation issued in the above-entitled court on the 5th day of January, 1916, and of the writ of error issued in the above cause on the 5th day of January, 1916, the originals of which citation and writ of error are on file in the office of the clerk of the District Court of the United States for the Western District of Washington, Southern Division, at Tacoma, Washington.

MORGAN and BREWER, and  
A. E. CROSS,

Attorneys for Defendants in Error. [116]

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. Esther Romi Penso et al., Defendants in Error. Acceptance of Service. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 12, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.



*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

OREGON-WASHINGTON RAILROAD & NAVI-  
GATION COMPANY, a Corporation,  
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO,  
by His Guardian *ad Litem*, LEON BEN-  
EZRA,

Defendants in Error.

**Prayer for Reversal.**

Comes now the Oregon-Washington Railroad & Navigation Company, a corporation, the plaintiff in error, and prays for a reversal of the judgment of the District Court of the United States for the Western District of Washington, Southern Division, in the action brought by Esther Romi Penso and Bensoir Penso by his guardian *ad litem*, Leon Benzera, plaintiffs, and defendants in error, against the Oregon-Washington Railroad & Navigation Company, a corporation, defendant, and plaintiff in error herein, which judgment was entered in the office of the clerk of the said court on the 1st day of November, 1915, and was for the recovery of Twenty-five

Hundred Dollars, together with costs and disbursements of action.

J. B. BRIDGES,

BRIDGES & BRUNNER,

BOGLE, GRAVES, MERRITT & BOGLE,

SULLIVAN & CHRISTIAN,

Attorneys for Plaintiff in Error, 1507 National Realty Building, Tacoma, Washington. [117]

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. Esther Romi Penso et al., Defendants in Error. Prayer for Reversal. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 5, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

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[Endorsed]: No. 2739. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. Esther Romi Penso and Bensoir Penso, by His Guardian *ad Litem*, Leon Benezra, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed January 22, 1916.

F. D. MONCKTON,

Clerk.

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

[**Certificate of Clerk U. S. District Court to Original Exhibits.**]

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the enclosed are the original exhibits introduced at the trial in the case of Esther Romi Penso and Bensoir Penso, by his guardian *ad litem*, Leon Benezra, vs. Oregon-Washington Railroad & Navigation Company, a corporation, No. 1585, in this Court at Tacoma, on behalf of the plaintiff and the defendant, to wit:

Plaintiff's Exhibit 1—Blue-print;

Plaintiff's Exhibit 2—Blue-print;

Plaintiff's Exhibit 3—Cert. copy Ordinance # 70;

Plaintiff's Exhibit 4—Cert. Copy Assignment franchise, etc.

Plaintiff's Exhibit 5—Photo;

Plaintiff's Exhibit 6—Photo;

Plaintiff's Exhibit 7—Photo;

Plaintiff's Exhibit 8—Photo;

Defendant's Exhibit "A"—Photo;

Defendant's Exhibit "B"—Photo;

Defendant's Exhibit "C"—Photo;

Defendant's Exhibit "D"—Photo;

Defendant's Exhibit "E"—Photo;

Defendant's Exhibit "F"—Photo;

Defendant's Exhibit "G"—Photo;

Defendant's Exhibit "H"—Photo;

ATTEST My official signature and the seal of this Court, in said District, this 18th day of January, A. D. 1916.

[Seal]

FRANK L. CROSBY,  
Clerk.

By E. C. Ellington,  
Deputy Clerk.

Received Jan. 21, 1916. F. D. Monckton, Clerk.

[Endorsed]: No. 2739. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, vs. Esther Romi Penso et al. Certificate of Clerk U. S. District Court Re Exhibits. Filed Jan. 22, 1916. F. D. Monckton, Clerk.





United States  
Circuit Court of Appeals

For the Ninth Circuit

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OREGON-WASHINGTON RAILROAD & NAVI-  
GATION COMPANY, a Corporation,  
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO,  
by his Guardian Ad Litem LEON BENEZRA,  
Defendants in Error.

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Brief of Plaintiff in Error

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Bridges & Bruener,

Aberdeen, Wash.

Sullivan & Christian,

Tacoma, Wash.

Bogle, Graves, Merritt & Bogle,

Seattle, Wash.

Attorneys for Plaintiff in Error. Clerk.

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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OREGON-WASHINGTON RAILROAD & NAVI-  
GATION COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

ESTHER ROMI PENSO and BENSOIR PENSO,  
by his Guardian Ad Litem LEON BENEZRA,  
Defendants in Error.

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Brief of Plaintiff in Error

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STATEMENT OF PLEADINGS.

This suit was originally brought in the Superior Court of the State of Washington, for Chehalis County, on or about April 15, 1914, and upon motion of the plaintiff in error was removed to the United States District Court, Western District of Washington, Southern Division. The plaintiffs were the defendants in error here. After the case was removed to the United States Court the complaint was twice amended, and the cause came on finally for trial on plaintiffs' second amended complaint, which in substance alleged:



That on the 11th day of April, 1914, Bensoir Penso was a minor eleven years old; that Leon Benezra is the duly appointed, qualified and acting Guardian Ad Litem of the person and estate of the said minor, and as such Guardian is authorized to maintain the suit on behalf of the minor; that the other plaintiff, Esther Romi Penso, was the wife of Haim Jack Penso, and that the above mentioned minor is the son of Haim Jack Penso; that the defendant is a corporation engaged in the operation of railway lines in the State of Washington and elsewhere.

That on or about November 4, 1913, at about the hour of 6 o'clock P. M., the said Haim Jack Penso was returning from his place of work in East Hoquiam to his home in West Hoquiam; that it was his custom and that of his fellow workmen to cross over the Hoquiam River on the railroad bridge, which latter was used as a common passage-way by Penso and many others with the knowledge and consent of the defendant, and that such practice had continued for a good many years; that when the said Penso reached a point near the middle of the bridge he was met by a gasoline motor car operated by the defendant; that such car was being operated at a high and unusual rate of speed and was carelessly and negligently driven upon the said Penso, and the latter was knocked from the said bridge into the waters of the Hoquiam River, as a result of which he was killed; that although the said Penso was in plain view of

those operating the car for a distance of several hundred feet from the point where he was struck, and those operating the car could plainly have seen his position of danger, they did not heed the same and carelessly drove the car against him; that the deceased was an able-bodied man, earning and capable of earning \$2.50 per day; that the plaintiffs have been damaged in the sum of \$20,000.

The answer denied that the bridge was commonly used by foot passengers with the knowledge and consent of the defendant, and that such practice had continued for years; denied that the deceased, Haim Jack Penso, was injured because of any negligence of the defendant, and denied that the defendant's motor car was, at the time mentioned in the complaint, operated in a careless manner or at a high or unusual rate of speed, and denied that the plaintiffs had been damaged in any sum whatsoever, and it denied, upon information and belief, all other allegations of the second amended complaint. In other words, it was a denial of practically every material allegation of the complaint.

The answer set up two affirmative defenses. The first one was contributory negligence on the part of the deceased Penso, and the second set up that the deceased knew and appreciated the dangers in undertaking to cross the bridge and assumed all the risk attendant upon so doing.

There was one verdict for \$2500 in favor of the plaintiffs, upon which verdict a judgement was entered.

## STATEMENT OF THE TESTIMONY.

The Hoquiam River runs through the City of Hoquiam and divides it into what may be termed East Hoquiam and West Hoquiam. West Hoquiam is the main portion of the City, but there are a number of large manufacturing plants in East Hoquiam. Many of the employes in these plants live in West Hoquiam. Two bridges span the Hoquiam River, one being the railroad bridge mentioned in the complaint, and the other being a wagon bridge located some distance above the railroad bridge. (R. p. 41). For a number of years it has been the practice of persons employed in the mills in East Hoquiam to walk over the railroad bridge, particularly in going from work at night. Not very many laborers crossed over this bridge when going to work, but they crossed over the wagon bridge. (R. p. 25, 28, 42, 47, 58, 68, 70, 72, 74). Two or three hundred people would probably cross over this bridge each day. (R. p. 25). As many as a hundred people have been seen on the bridge at one time, preparing to cross. (R. p. 25, 58). The defendant's employes had for a long time known that such use had been made of the bridge. (R. p. 47, 54). The deceased, Haim Jack Penso, for a long while had been in the habit of crossing the bridge at the close of work day. (R. p. 40).

The Hoquiam River is an important navigable stream and a good many boats pass through the railroad draw bridge each day. In order to let these

boats pass it is necessary to turn the draw span of the bridge. (R. p. 32, 33).

This is a large, heavy steel bridge, the draw span being 300 feet in length. (R. p. 32, 36). At each end of the draw span there is a platform large enough for a number of men to stand at the side of the track. Stairways lead from the ground below up to these platforms. There is also a platform in the center of the bridge. (R. p. 28, 29, 34, 47, 68, 70, 72). There is a bridge tender's house located about the center of the bridge and high above any passing trains. The draw span is operated from this house. (R. p. 75). There are various plates and girders upon which a man could get and be out of danger of a passing train. (R. p. 39, 42, 54, 56, 57, 58, 60, 70, 71, 72, 74). The manner of construction of this bridge, as well also as the platform, girders, plates, etc., are shown much more distinctly in the numerous photographs offered as exhibits and now a part of the record, than we can here describe. We particularly call attention to Plaintiff's Exhibit 5, 6, 7, and Defendants' Exhibits C, D, H. Many times have men, while on the drawn span, been met by trains crossing the bridge, and they have always succeeded in getting out of a place of danger by getting onto some of the platforms of the bridge, or by stepping upon some of the plates or girders, or standing with the feet on the ends of the ties and leaning against the steel upright pieces. (R. p. 42, 54, 56, 57, 58, 60, 70, 71, 72, 74). In all the years while it has been a practice for men



to cross over this bridge, the deceased was the first person to be injured by a train, (R. p. 72), if he was in fact injured by the car in question.

There is a long, high pile trestle forming a part of the railroad track, leading up to each the west and east end of the draw span of the bridge. Where the trestle connects with either end of the draw the elevation above the ground below is about seven feet. (R. p. 26, 28). These trestles reduce in height from the bridge approach. There is a fairly steep grade, particularly of the trestle leading up to the west approach to the draw span. (R. p. 31, 32).

All of the trains of three transcontinental railroads, to-wit, the plaintiff in error, the Northern Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company, pass over this bridge. (R. p. 33). In the neighborhood of thirty-five to forty trains, of all descriptions, pass over this bridge each twenty-four hours (R. p. 33, 75, 76); among others, there was the gasoline motor car alleged in the complaint. It was a large, heavy car. (R. p. 43, 51). It was equipped with a strong headlight, a whistle and a bell. (R. p. 50, 51, 52). This car operated exclusively between Hoquiam and Montesano, which latter place is about fifteen miles to the east of Hoquiam. (R. p. 48, 63). It generally made two round trips per day. (R. p. 63). For at least several weeks immediately prior to the injury, and at the time of the injury, its schedule provided that it should leave the

Hoquiam station in West Hoquiam, at 6 o'clock P. M. (R. p. 45, 59, 63). The Hoquiam station is in West Hoquiam and is about eight or ten common city blocks west of the west approach of this bridge. (R. p. 32).

For a distance of approximately three hundred feet west from the west end of the draw span, the track is perfectly straight, and when at night an engine coming from west reaches this straight track, the headlight will show straight into and completely through and beyond the bridge (R. p. 30, 33, 34, 59, 66. See also various photographs).

The deceased was working at the Coats Shingle mill in East Hoquiam, which mill is located about a quarter or half a mile east of the draw bridge, and it takes ten or fifteen minutes to walk from the Coats mill to the bridge. (R. p. 15, 37, 38). On November 4, 1913, the deceased and a man working with him at the Coats mill, stopped work about ten or fifteen minutes of six o'clock in the evening, and they started towards the bridge, walking along the railroad track and trestle leading to the bridge. (R. p. 37, 38). It was dark and raining. ( R. p. 38, 42, 67, 52). The deceased was very near the west end of the bridge when the motor car came on that end of the bridge (R. p. 39, 40, 48, 54, 61), and the deceased, at the time he was hit by the motor car, or, if, he was not hit, fell off the bridge, was within a few feet of the west end of the bridge. (R. p. 39, 40, 48, 54, 61).

The motor car was running at the rate of about six miles an hour from the time it left the station in West Hoquiam, until it came upon the bridge. (R. p. 47, 48, 67, 69). The motorman was at his lookout window. (R. p. 48, 49). The car was stopped as soon as possible. (R. p. 48, 49, 55, 59, 68, 69). When the car had come to a stop about one-half of it was on the draw span and the other half on the west approach. (R. p. 55, 67, 69). The deceased was at about the middle of the bridge when he saw the headlight on the car. (R. p. 38, 39, 40).

The deceased did not talk or write English. (R. p. 23, 24, 43). He was a foreigner and lived near Constantinople. (R. p. 23). He was approximately 39 years of age. (R. p. 21). He had been in this country about six years. (R. p. 21). He left a wife and minor child in the Old Country. (R. p. 21, 22, 23). He had never become a naturalized citizen of the United States. (R. p. 23). His son was at the time of his death a minor, (R. p. 23). Sometime subsequent to his death his body was found. (R. p. 43, 44).

The foregoing facts are practically undisputed and nearly all of such facts came out in the plaintiffs' testimony.

There were but three eye witnesses to the accident, one of which testified for the plaintiffs and the other two for the defendant, one of defendant's eye witnesses being the motorman in charge of the gas car.

The plaintiffs' eye witness was named Theo. Balabanas, and, briefly speaking, he testified that he and deceased had worked together about a year at the Coats Shingle mill before the deceased's death; that he and deceased had many times crossed this railroad bridge; that while they were working at the Coats Shingle mill they crossed it every night; that they left the Coats mill at about fifteen minutes to six; that deceased was hurt on the bridge—was knocked down by the car. They were at about the middle of the bridge when they saw the car coming; that the deceased was walking a little ahead of the witness. Witness saw the headlight on the approaching car, but did not hear any whistle or bell ringing; that witness, when he saw the car coming, got into a place of safety by leaning over on one of the iron posts of the bridge. After witness saw the light of the car, he saw deceased running towards the west end of the bridge; he did not see the car hit deceased; he and deceased had walked over the bridge every night for about a year. (R. p. 37, 38, 39, 40).

One of defendant's eye witnesses was named Louis H. Luckey. He had walked over this bridge many times, and met trains on it, and he would always get out of the way. He walked over the bridge behind the deceased. He saw the headlight of the car approaching the bridge. He saw a man ahead of him, walking in the middle of the track, but he did not see the car hit the man. He saw the man, whom he supposed was deceased, walking right to-



wards the west end of the bridge, and until he got close to the car, and after that he did not see him. The bell on the car was ringing all the time and even when the car stopped. (R. p. 57, 58, 59, 60, 61, 62.)

The other eye witness was J. Hendricks, the motorman of the car. He testified that he left the Hoquiam station on schedule time, at six o'clock, and that, as was his custom, he started the bell ringing when he left the station and that it continued to ring until after the car was stopped on the bridge; that the bell will ring automatically; that it is an automatic air bell; that as he approached the bridge he sounded the whistle. He knew that people were liable to be crossing the bridge and was on the lookout; that the headlight was burning brightly and showed through the bridge. He observed a man on the bridge approaching the car in the ordinary way. At that time the man was in the center of the track and about three hundred feet from the car. He did not know deceased, but believed the man whom he saw was deceased; that the man stepped off to one side, into a place of safety, and just as the car came onto the west end of the draw bridge, the man suddenly jumped in front of the car, and the witness thought that he might have hit the man and stopped his car as soon as possible—stopped the car within ten or fifteen feet. Witness said that the man was leaning up against one of the bridge pillars and was in a place of safety until he left that place and

jumped in front of or to the side of the car. Witness could see clear through the bridge before the car had reached the westerly approach. He saw this man on the bridge when the car was about three hundred feet away from the west end of the bridge. He saw only one man. He did not know whether the car hit the deceased. (R. p. 45, 46, 47, 48, 49, 53, 54, 55, 56).

We have here only undertaken to give the substance of the testimony of these three eye witnesses, insofar as their testimony related to things which they saw and did. We will later refer more particularly to the testimony of these three witnesses.

At the close of plaintiffs' testimony the defendant moved for a dismissal of the case for want of sufficient evidence which motion the court denied, and exceptions thereto were taken by defendant.

At the close of all the testimony the defendant moved for a directed verdict for the defendant, which motion the court refused, and exceptions were taken.

### **ASSIGNMENTS OF ERROR.**

The plaintiff in error claims the following assignments of error upon which it will rely:

#### **1.**

The court erred in overruling, at the close of plaintiffs' testimony, the motion for dismissal of the case for want of sufficient evidence, which motion was based upon the ground that the evidence was insufficient to show negligence on the part of the de-

fendant company, and also upon the ground that the evidence showed that the deceased was guilty of contributory negligence.

## 2.

The court erred in refusing to give instruction No. 1, at the request of defendant, which instruction is as follows: "You are instructed to return a verdict in this case for the defendant. Under the testimony the evidence does not justify a rendition of a verdict against the defendant."

## 3.

The court erred in refusing to give instruction No. 2, at the request of the defendant, which instruction is as follows: "You are instructed that you cannot return a verdict in favor of Esther Romi Penso, widow of the alleged deceased, in any event."

## 4.

The court erred in refusing to give instruction No. 3, at the request of defendant, which instruction is as follows: "You are instructed that as to the plaintiff Bensoir Penso, the alleged minor, you cannot return any verdict in his favor for any damages whatsoever, nor in favor of his guardian ad litem. The evidence is insufficient to justify any verdict of the jury in his favor, or any allowance of damages in connection therewith."

## 5.

The court erred in refusing to give instruction

No. 4, at the request of the defendant, which instruction is as follows: "In view of the fact that all the testimony discloses that the engine in question was lighted by a headlight that could be seen for a long distance you are instructed that the question whether the bell was rung or not on the car just prior to the accident is immaterial in this case and you cannot find any negligence based upon the fact that the bell was not rung."

## 6.

The court erred in refusing to give instruction No. 12, at the request of the defendant, which instruction is as follows: "You are instructed that the fact that the party claimed to have been killed, for a long period of time prior to the accident traveled in the morning to his work over a right of way bridge across the river at some distance from where this railroad bridge was operated is a circumstance which you should consider in determining whether the alleged deceased was guilty of contributory negligence. The testimony discloses that he could go to his work, and did go to his work in the morning by a route over which there were no trains operated, and this being so you have a right to take this circumstance into consideration in determining whether he was guilty of contributory negligence in going upon the bridge where it is claimed he was killed."

## 7.

The court erred in refusing to give instruction



No. 20, at the request of the defendant, which instruction is as follows: "If you believe from the evidence that it was dangerous to undertake to cross over the said bridge at the same time a car or train was crossing over the same and you further believe that the deceased, immediately prior to going on said bridge, knew or by the exercise of reasonable care should have known that he would meet the said motor car or other car or trains on such bridge, if he undertook to cross the same at the time he did undertake to cross, then the deceased would be guilty of such contributory negligence and assumption of risk as would defeat any recovery for the plaintiffs herein, and under those circumstances your verdict must be for the defendant."

## 8.

The court erred in giving to the jury the following instructions: "The order in which you would naturally take up the consideration of these issues would be, first, to determine what, if any, relationship this boy and this woman bear to the deceased. If there is a fair preponderance of the evidence that one was wife and is today the widow, and that the other was the son, then the next step would be logically to determine whether the deceased contributed in any way proximately to his own death, by his own negligence." For the reason that no damages could be awarded to the minor, and also that damages could not be united in one verdict for both plaintiffs jointly.

## 9.

The court erred in giving the jury the following instructions: "If you find that the defendant was so negligent, by a fair preponderance of the evidence, you would then pass to what recovery should be awarded the plaintiffs in this case. In assessing the amount of recovery, you would not be influenced by any sentimental consideration, and you would not allow any damage for merely grief, or injury to the feelings which may have resulted from the loss of the parent, but you would confine your verdict to such an amount as would fairly compensate the plaintiffs in this cause for the death of the deceased Penso." For the reason that no damages would be awarded to the plaintiffs in any event under the proof in this case, and also that damages could not be united in one verdict for both plaintiffs jointly.

## 10.

The court erred in rendering judgment in the case in favor of the plaintiffs.

**ARGUMENT AND AUTHORITIES.**

## I.

**Insufficiency of the Evidence.**

At the close of the plaintiffs' testimony the defendant moved the court for a dismissal of the action as to each and both of the plaintiffs, on the ground that there was insufficient evidence to permit the plaintiffs, or either of them, to recover.

This motion should have been granted by the court upon at least two grounds: (1) for the reason that the plaintiff's testimony wholly failed to show any negligence upon the part of the defendant; (2) because the plaintiffs' testimony plainly showed that the deceased was guilty of contributory negligence.

As we have stated before, the plaintiffs had but one eye witness, and necessarily their right to recover must depend very much upon the testimony of that witness. That the court may more conveniently review this question, we will here quote all the testimony in the record of this eye witness, insofar as it pertains to what the witness saw or heard. The witness was named Theo. Balabanas and his testimony will be found on pages 37 to 41, both inclusive, of the record.

This witness testified: That he and the deceased worked together at the Coats Shingle mill; that witness and the deceased left the factory together on the day the deceased was killed, at a quarter to six o'clock. They worked together. Witness had crossed over this railroad bridge many times; that while working at the Coats Shingle mill he crossed the bridge every night; that he and the deceased had been working at the Coats mill for about a year, and that every night during that time they crossed over this bridge; that in going to work in the morning the witness used the wagon bridge; that witness had not previously met a car or train on the railroad bridge, but that he had seen the motor

car at the depot. He did not know when the car left for Montesano. That he and the deceased, on the night of the accident, quit work at a quarter to six o'clock.

The remainder of his testimony is concerning the manner of the accident and is quoted from the record as follows:

“He and deceased, on the evening of the accident, left the mill at a quarter to six and were on the bridge at six o'clock. It took fifteen minutes to walk from the mill to the bridge. It was a fairly dark night and was raining a little. Deceased was hurt on the bridge. Knocked down by the car. He was struck and then his body went down and witness did not see his body.

Witness and deceased was going towards the bridge when deceased was struck by the car, and towards town. It was a gasoline car which goes to Montesano that struck him. When crossing the bridge deceased and witness were walking together. At the time deceased was struck by the car witness stopped to roll a cigarette and Penso went on ahead. They were in the middle of the bridge when the car was approaching. That when walking across the bridge there were planks that they walked on, and were going towards Hoquiam. That witness did not know when the car was coming, but he and deceased were passing on the bridge every night. They were crossing the bridge every night. Witness did not know whether the car would cross the bridge at that time or not. The witness did not hear any whistle from the car. Did not hear any bell ringing. That the way he knew the car was coming was when he stopped to roll his cig-



arette and deceased passed a few steps ahead, then the car passed right ahead. That when witness saw the car he started to walk and when deceased was struck witness went over and dropped on to an iron post on the bridge. That he got over to the iron post by stepping on the rail and then putting his hand upon the post. Witness then pointed out the post on Plaintiff's Exhibit 7, which he got hold of, saying it was the post right in the middle of the bridge. Witness then pointed out and marked the post on Plaintiff's Exhibit 7, which he got hold of, pointing to the upright post nearest the west end of the bridge on the up-river side. That as the witness stopped deceased was right on the step, and deceased was struck by the car and then the passengers and some of the brakemen came down with ladders and were looking for the body and they only found his dinner pail.

That witness stepped over and put his hand around the post and stopped there. Asked how soon he did that after he saw the light of the car, he answered it was about 24 feet. That after the witness saw the light of the car and before he moved to the post he put his arms around. Witness had walked four or five feet after he saw the car coming, then he put his hands around the post and stayed there, and then came down again. When the deceased was struck witness dropped the post.

That there was no place deceased could have gotten off the bridge, excepting the platform that deceased was going towards, after the car was seen. That there was no other room or platform, excepting the stairs. That Penso was killed, but that he did not see him. After witness saw the light of the car deceased was running to

cross the steps and as he tried to cross the steps deceased was knocked down by the car. Deceased was trying to put his feet on the stairs when he was struck by the car. He meant by the stairs, on the platform. Right on the platform. That one of the feet of deceased was on the rail and one on the platform. That after witness saw the light of the car there was no place deceased could have gotten to as a place of safety, excepting the platform towards which he was running. That as to why there was not any other place he did not know. There were only a few boards inside the rails and no other room at all. That deceased could not have stepped off on the side like witness did because deceased was ahead, right close to the stairs. That there was no place on the side of the bridge where deceased could have got hold of before getting to the platform. That he did not know how many minutes it was after witness saw the light on the car until deceased was struck by the car, but that he did know that deceased was running to get to a place of safety."

# 1. WAS THE DEFENDANT NEGLIGENT?

We are wholly unable to find any testimony in the record which even tends to show that the defendant was guilty of any negligence causing this injury. Its car was in first class repair and running condition. It had a strong headlight, which was burning. The plaintiffs did not introduce a word of testimony concerning the speed of the car at any place between the station and the bridge. It was shown that the defendant knew that laborers were in the habit of crossing this bridge. Therefore, in the absence of any showing to the contrary, we have a right to assume,

and do assume, that the car was running at a proper and reasonable speed. There is nothing in the plaintiffs' testimony to indicate that the motorman was not at his proper place in the car and keeping a look-out; therefore we have a right to assume, and do assume, that the motorman was properly performing his duty. The court will not assume, simply because an accident happened, that the defendant's employes were guilty of any negligence, but, on the contrary, will assume that they were not guilty of negligence. It is true that plaintiff's one eye witness testified that he did not hear the bell or whistle. That would hardly be proof sufficient, however, that they were not sounded upon approaching the bridge. It will be observed that no witness for the plaintiffs testified that the bell was not ringing and the whistle was not sounded. But even if it should be conceded that the proof shows that the bell was not ringing and the whistle was not sounded, yet that would not be any proof of negligence, because the only purpose, of course, in giving such signals, was to warn concerning the approach of the car. The plaintiffs' testimony showed that the headlight on the car shone distinctly clear through the bridge when the car was at a point approximately three hundred feet west of the west end of the draw span. The deceased must consequently have seen the headlight and had just as much knowledge concerning the approach of the car as if the bell had been rung and the whistle sounded.

The only possible argument that the testimony

shows negligence of defendant's employes, would be the argument that the motorman could and should have seen the deceased in time to have stopped his car before the accident. But this ground cannot be maintained under the evidence. Certainly the deceased was in as good a position to see the approach of the car as the motorman was to see the deceased. The lower court properly stated the law when it instructed the jury that the law does not require a railroad company to stop its trains simply because there are persons upon its tracks, and that the mere fact that a person is seen walking in front of a train does not, as a matter of law, require that the train should be brought to a stop, because it is the duty of the person so walking to step out of the way of the train, and the train crew has a perfect right to anticipate that the person will step off the track, unless the train crew knows that the conditions are such that the person walking on the track will not or may not be able to get out of the way.

So in this case, if it be conceded that the motorman saw or should have seen the deceased on the bridge and approaching the car, there was no duty on his part to stop the car for that reason, because he had the right to presume, until the contrary should appear, that the deceased would get on the side of the bridge and thus get out of the way. There is absolutely nothing in the plaintiffs' testimony which even tends to show that the motorman should have known that the deceased was in a place of danger



from which he probably could not extricate himself. It is true this eye witness said that after he saw the light of the car, which was at the time when he was near the middle of the bridge, there was no place deceased could have gotten to as a place of safety, but this portion of the witness' testimony is so fully overcome by other testimony of the plaintiffs, that it is manifestly wrong. Nearly every witness the plaintiffs had upon the stand, and nearly every witness the defendant had on the stand, testified that for years men have been in the habit of getting out of the way of trains at any place on the bridge. The photographs show also conclusively that there were a number of ways whereby the deceased could have gotten out of the way of the train. This eye witness' own testimony directly contradicts his statement that there was no place where the deceased could have gotten out of the way, because the witness states that he himself got out of the way of the train by leaning up against the post or upright part of the bridge nearest the west end of the bridge, and consequently very close to where the deceased was injured. It must follow, therefore, that if it be conceded that the motorman saw or should have seen the deceased, there is absolutely nothing in the testimony to indicate that the motorman knew or should have known or suspicioned that the deceased could not and would not get into a place of safety. There is nothing in the plaintiff's testimony which even tends to indicate that the motorman did not stop his car as soon

as possible upon learning that there was danger of the deceased getting hurt; on the contrary, the plaintiffs' testimony shows that the car was stopped immediately at the west end of the draw span.

To hold that, under the circumstances of this case, it was the duty of the motorman to have stopped his car before coming on to the draw span, would be equal to holding that the defendant would be required to stop and hold all of its trains until the hundreds of people who daily cross this bridge have safely gotten across. The law does not impose any such obligation. While the deceased probably was not a trespasser, yet he was nothing more than a licensee—he was crossing the bridge for his own convenience and a greater duty rested upon him than if he had been invited by the Railroad Company to use the bridge.

## 2. CONTRIBUTORY NEGLIGENCE.

As a part of its motion for a dismissal of the case the defendant contended that the plaintiffs' evidence showed that deceased was guilty of such contributory negligence as to defeat the action.

In examining this question we find that the deceased had been walking over this bridge every night for a year or more and that the place where he worked was close to the railroad track. He necessarily knew all about this bridge and all the dangers incident to walking across the same. He knew that all the railroad trains operating in and out of Hoquiam

must of necessity pass over it. He knew that a train was liable to cross the bridge at almost any moment. Inasmuch as the scheduled time for the Hoquiam-Montesano gas car to leave Hoquiam was six o'clock, and such had been the schedule for a number of weeks at least immediately prior to the injury, it is fair to presume that the deceased knew of the schedule of this motor car, and we believe it is likewise fair to presume that he must have met the car on the bridge at times prior to the date of his injury. No man could have been more conversant with this bridge and its dangers and the places it afforded for persons to get out of the way of trains, than the deceased. He knew that at the easterly end of the draw span there was a platform upon which he could stand and be in perfect safety. He also know that in the middle of the bridge there was another platform upon which he could stand and be in a perfectly safe place. He also knew that there was a similar platform at the extreme westerly end of the bridge. He knew that if he met a train on the bridge he could lean up against some of the steel upright pieces and get out of harm's way.

With such knowledge we find that the deceased must have come on to the easterly end of the bridge a considerable time after the motor car had left the Hoquiam station. According to the testimony of plaintiffs' only eye witness, the deceased was at about the middle of the bridge when he first saw the headlight of the coming car, at which time the car

would have been about three hundred feet to the west of the west end of the bridge. It must be remembered that all of the testimony shows that when the car got within approximately three hundred feet of the west end of the bridge the strong headlight shone upon and completely through and beyond the bridge. All the testimony concedes that the accident happened very close to the west end of the bridge. Under these circumstances the car would have a little more than three hundred feet to go while the deceased was traveling less than half the length of the bridge or a little less than one hundred and fifty feet. All the testimony shows that the car at that time was going at the rate of about six to eight miles an hour. Under these circumstances it is inconceivable why the deceased did not get on the platform in the center of the bridge and wait for the car to pass him, or if he did not choose to get on the platform, he had more than ample time to have gotten down on some of the plates or against some of the girders of the bridge, so that he would have been entirely out of the way. This is what everybody else before him had done under like circumstances, and this is what his partner, the plaintiffs' eye witness, did. But the deceased was evidently content to take his chances in beating the car to the westerly end of the bridge. This eye witness also undertook to get across ahead of the car, and, as a matter of fact, succeeded in getting within some twenty or twenty-five feet of the westerly end of the bridge.



He himself testifies, as shown on Plaintiffs' Exhibit 7, that he leaned up against "the upright post nearest the west end of the bridge on the up-river side." This witness further testified that after he "saw the light of the car deceased was running to cross the steps and as he tried to cross the steps deceased was knocked down by the car. Deceased was trying to put his feet on the stairs when he was struck by the car. He meant by the stairs, on the platform." In other words, the testimony of this eye witness shows, and all of the circumstances show, that the deceased, knowing that the car was close by, negligently and carelessly and in total disregard of his safety undertook to beat the car to the end of the bridge at a time when he had ample opportunity to have gotten on to the platform at the middle of the bridge, or to have done as his associate did, lean up against an upright pillar, or gotten down on some of the plates or girders and have been in a perfectly safe place.

Even if the facts were that there had been no place on the bridge whereby the deceased could have gotten out of harm's way, certainly ordinary care on his part would have required that when he saw the car coming he should have gone in the opposite direction, in an effort to get off the bridge, rather than go in the direction which would compel him to meet the car. It seems to us that the deceased did everything which, under the circumstances, an ordinarily prudent man would not have done.

In the case of *Texas Midland R. Co. v. Byrd*, 115 S. W. (Tex.) 1163, the facts showed that a person met a train on a railroad bridge about two hundred feet in length, and that people had been in the habit, with the knowledge of the Railroad Company, of walking across this bridge. The court said:

“Giving all the effect of implied license to use the bridge as is claimed for it in this case, it could hardly be said that it implied a license to use the structure to the obstruction of the defendant’s business. Persons found on the track of the road would necessarily interfere with the free use of its track by the defendant company, for if his peril was discovered, the Company would be compelled, in order to avoid injuring him, to stop its train in toto until he had placed himself in a place of safety. We think that the doctrine upon which the license of the Railroad Company is implied, by the use which persons put to it by using it as a foot-path, has been pushed far enough in this state, and we are not inclined to let it go any further. We are clearly of the opinion that the defendant was guilty of contributory negligence in going upon the trestle where he was in danger of being struck by a train or being forced to jump and injure himself.”

So in the case at bar, either this bridge was reasonably safe for foot passengers to walk over it, or it was unsafe for that purpose. If there was no way whereby a foot passenger could get out of danger, upon meeting a train, then it must follow that it would be the height of negligence for any person to undertake to walk across the bridge when there was any reasonable chance of meeting a railroad

train. If, on the contrary, (as the evidence quite conclusively shows) there were places whereby the person walking across the bridge could get out of harm's way, then it certainly was the duty of the deceased, in this instance, to have gotten into a place of safety. In either event he would be guilty of negligence; in the one instance for undertaking to walk across the bridge at all, and in the other for not getting into a place of safety when he knew that a train was approaching the bridge.

In the case of *Goudreau v. Conn. Co.*, 80 Atl. Rep., 281, the suit was one for damages where a person walking over a bridge was met by a train and killed. The court, after disposing of other questions, said:

“Again, if the motorman had seen Goudreau sooner than he did, it cannot reasonably be said that he was negligent in not anticipating that Goudreau would run directly toward the car, instead of away from it, or instead of seeking safety on the platform which was near him when he first saw the car.”

In the case of *N. P. Ry Co. v. Jones*, 144 Fed., 47, being a case out of this court, it was said:

“Conceding that the defendant in error was a licensee, and that all trains and locomotives should have been moved upon said track with proper regard for his safety, the most that can be said of the duty of the railroad company in that regard is that it was bound to use reasonable caution to avoid injuring him. \* \* \* A gen-

eral license to the public to walk upon a railroad track does not mean that the railroad company is to be the insurer of the safety of all persons who avail themselves of that permission. While the license adds to the responsibilities of the railroad company, and imposes upon it a greater burden of care, it does not affect the duty that rests upon the licensee to take all due precautions to avoid injury to himself."

In the case of *Brown v. St. Louis etc. R. Co.*, 55 So., 107, it was held that where a person, after finding himself in a place of danger upon a railroad trestle, and in danger of being run over by an approaching train, runs alongside the trestle and on the track, towards the approaching engine, until too late for the defendant's servants in charge of the engine to avoid the injury, he is guilty of contributory negligence.

A railroad engineer need not slacken speed merely upon seeing a pedestrian upon the track, but may assume that he will use his faculties for his own safety and leave the track in time to avoid injury. *Talley v. So. Ry. Co.*, 80 S. E., 44.

Where plaintiff, a permissive licensee, used defendant's railroad track, which he knew consisted of a trestle over a part of the public street, he was negligent, where there was another and safe way leading to his home, but a little longer. *Holt v. Texas Midland R. Co.* 160 S. W., 327.

The principles of law applicable to the facts in



this case are so simple and universally recognized by the courts, that it seems to us unnecessary to make any further citation of authorities.

## II.

### **THE COURT SHOULD HAVE INSTRUCTED A VERDICT FOR DEFENDANT.**

At the close of all the testimony in the case the defendant moved the court to instruct the jury to return its verdict in favor of the defendant, and defendant also in writing requested the court to instruct the jury to return a verdict in its favor.

The plaintiffs did not undertake to offer any testimony concerning the speed of the car at and before the accident, or to indicate whether the motorman was on the lookout, or as to whether he saw the deceased, or as to any efforts upon his part to stop his car. But the defendant introduced the testimony of the motorman, and of another eye witness named Luckey touching these and other points.

The motorman testified that his car left the Hoquiam station on schedule time, at 6 o'clock; that when the car was leaving the station he started the bell ringing; that he had to push a button which would start the bell ringing, and that it would continue to ring until another button was pressed, which would stop it; that the bell continued to ring until after the car had stopped on the bridge; that

upon approaching the bridge he blew his whistle. (R. p. 45, 46).

This testimony was supported by the defendant's eye witness Luckey. (See R. p. 59, 60). It was further supported by the testimony of defendant's witness Anderson, who was the conductor of the car (R. p. 63, 64, 65), and also by defendant's witness Taylor, who was one of the operators of the car. (R. p. 67).

He further testified that as the car approached the bridge it was moving at the rate of about six miles an hour, and that the headlight was burning in good order. (R. p. 47, 48).

This testimony was supported by defendant's witnesses Taylor, one of the operators of the car. (R. p. 67, 69).

With reference to the accident he testified as follows:

“That on the evening of the accident he observed one man on the bridge approaching in the ordinary way. When he first saw him he was distant about 300 feet and was walking towards the car and was in the center of the track; that there was a tin covering between the track. He did not know the man he saw, did not know deceased during his lifetime. The man was walking up and always toward the motor car and he stepped off to one side and that all witness saw was that he turned around and jumped in front as if he was going to make a get-a-way or something and witness imme-

diately applied the emergency air and stopped and did not see anything more of the man. That he applied the emergency air as soon as the man he saw started back away from where he was and that he stopped the car. He did not see anybody hit and did not feel any impact. \* \* \* That he stopped his car as soon as he could after he discovered that the man was attempting to move from his place. As quick as he saw the man moving he threw on all of the air, that is the emergency brake, and stopped the car. \* \* \* That a man could lean against an upright with safety, without the car hitting him. That he supposed the man was safe when he was at this pillar and had no reason to think he was liable to be hit. That this was a common occurrence there on the bridge when people were crossing it. That people were seen there every once in awhile. That the man made some motions from this upright and when he did the witness stopped the car just as soon as he could, (R. p. 48, 49).

That when he first saw men or any man on the bridge on this particular night was when he had just come around the curve and started on the straight piece of track, entered the bridge, he was looking out observing to see if anyone was on the bridge. That was about—he thought—right at the point on the curve at the place where the car came on the straight track so that the headlight showed right on the bridge and this is when he first saw the man far ahead. That he only saw one man. That he was walking towards the car. \* \* \* He walked quite a little way towards the car and finally stepped off towards one side and then he bobbed up again and that was the last he saw of him. (R. p. 54). \* \* \* That if he had stayed where he was he would have been in the clear. He was over to one side.

He naturally supposed the man was going to stay there." (R. p. 55).

The motorman's testimony was in most regards supported by defendant's witness Luckey. (R. p. 59, 62).

Most of our argument addressed to the motion for dismissal of the case at the close of plaintiffs' testimony is applicable to this branch of our argument, and we will not make an additional extended argument on this point.

We cannot conceive of any ground upon which our motion for non-suit was denied, except on the alleged ground that inferences from the plaintiffs' testimony could be drawn to the effect that the motorman should have seen, but did not see, the deceased, or that he did see him and did not exercise reasonable care to avoid injuring him.

Any inferences of this kind which might properly have been drawn from the plaintiffs' testimony, were absolutely disposed of by the uncontradicted testimony of the motorman and other witnesses of the defendant. It will be remembered that the only testimony of the plaintiffs which even tended to show that the bell was not ringing and the whistle was not blown, was the testimony of plaintiffs' one eye witness, who simply said that he did not hear these signals. He did not state that the signals were not given. On the contrary, three or four witnesses for the defendant testified positively that the whistle was blown and the bell was ringing.



It has been correctly held that where witnesses testify that they did not hear the signals given, and other witnesses testify positively that the signals were given, there is nothing to go to the jury on that point.

*Rich v. C., M. & St. P. Ry. Co.*, 149 Fed., 79.

*Chicago etc. Ry. Co. v. Andrews*, 130 Fed., 65.

*Baltimore etc. Ry. Co. v. Baldwin*, 144 Fed., 53.

*Culhane v. R. R. Co.*, 60 N. Y., 133.

But it is wholly immaterial here whether these signals were given. The only purpose of them would be to warn of the approach of the car, and since all witnesses admit that the headlight was burning and could be seen by the deceased in ample time to have avoided the injury, there was no need for other signals.

The possible inference from plaintiffs' testimony, that the motorman was at fault in not seeing the deceased, or if he saw, in not stopping his car in time to avoid the injury, is absolutely overcome as above indicated, by the positive testimony of the motorman and other supporting witnesses. The motorman's testimony is, that he was running his car at a very slow rate; that he anticipated some person might be on the bridge; that he was on the lookout, and that he saw the man whom he believes to have been the deceased.

If such be the facts, as in truth they are, then how can it be said that the motorman was in the slightest degree negligent?

### III.

#### **REQUESTED INSTRUCTION.**

The defendant requested and the court refused to give the following instruction:

“In view of the fact that all the testimony discloses that the engine in question was lighted by a headlight that could be seen for a long distance you are instructed that the question whether the bell was rung or not on the car just prior to the accident is immaterial in this case and you can not find any negligence based upon the fact that the bell was not rung.”

All of the testimony in the case showed that when the motor car got within three hundred feet of the westerly end of the bridge the headlight could be plainly seen clear through the bridge and far beyond. Inasmuch as the only purpose of ringing the bell or blowing the whistle would be to give notice of the approach of the car, it seems to us that the fact that the deceased saw the headlight was amply sufficient warning. To have sounded the whistle and rung the bell would have added nothing to the warning. The plaintiffs offered testimony which had a tendency to show that neither of these signals were given. The jury might have returned its verdict solely on the ground that these warnings were not given. It was, therefore in our judgment,

the duty of the court to have given this instruction. Certainly it was the law, and we are convinced that the refusal of the court to give the instruction was prejudicial error.

#### IV.

#### **REQUESTED INSTRUCTION.**

The defendant requested and the court refused to give the following instruction to the jury:

“You are instructed that the fact that the party claimed to have been killed, for a long period of time prior to the accident traveled in the morning to his work over a right-of-way and bridge across the river at some distance from where this railroad bridge was operated is a circumstance which you should consider in determining whether the alleged deceased was guilty of contributory negligence. The testimony discloses that he could go to his work, and did go to his work in the morning by a route over which there were no trains operated, and this being so you have a right to take this circumstance into consideration in determining whether he was guilty of contributory negligence in going upon the bridge where it is claimed he was killed.”

That there was ample evidence upon which to base this requested instruction, there can be no dispute.

In determining whether the deceased was negligent in undertaking to cross the bridge at all, and particularly at night, the jury should take into consideration the necessities and conveniences in so

doing. We believe all the courts which have discussed this question support the view announced.

If the railroad bridge was the only means by which the deceased could have gotten from his place of employment to his home, the jury might consider that it was not negligence on his part to walk over the bridge at night. If there was another convenient and less dangerous way, the jury might well determine that the deceased was guilty of negligence in selecting the most dangerous way. By refusing to give this instruction, or any other of similar substance, the court practically gave the jury to understand that under no circumstances would it be negligence on the part of the deceased to walk across this bridge.

Certainly this instruction states the law as announced by all the decisions, and it should have been given.

## V.

### **REQUESTED INSTRUCTION.**

The defendant requested and the court refused to give the following instruction:

“If you believe from the evidence that it was dangerous to undertake to cross over the said bridge at the same time a car or train was crossing over the same and you further believe that the deceased, immediately prior to going on the said bridge, knew or by the exercise of reasonable care should have known that he



would meet the said motor car or other car or trains on such bridge, if he undertook to cross the same at the time he did undertake to cross, then the deceased would be guilty of such contributory negligence and assumption of risk as would defeat any recovery for the plaintiffs herein, and under those circumstances your verdict must be for the defendant."

This instruction went to the very marrow of the question of contributory negligence. The undisputed testimony had shown that the deceased had been walking over this bridge every night, at about 6 o'clock, for at least a year; that all the trains of three large railroad companies were operated over that bridge, and that it was in almost constant use; that for a number of weeks this motor car had its schedule to leave the Hoquiam station at 6 o'clock for Montesano, and that nearly all the time it was operated on time, and that this car would almost invariably, during those number of weeks, pass over the bridge between 6 o'clock and five minutes thereafter. Now if the deceased knew that this car was due to pass over that bridge at approximately the time he was undertaking to pass over it, and he disregarded such knowledge, he certainly would be guilty of such contributory negligence as would prevent any recovery. It cannot be said that a man would be using reasonable care and caution to undertake to cross over this bridge when he knows that in all probability he will meet a train thereon.

There was ample testimony upon which the jury

could find that the deceased knew that he would probably meet this particular car on the bridge, and if the jury had so believed and the court had given this instruction, the jury must of necessity have returned a verdict for the defendant on the ground of contributory negligence. We cannot conceive why the court did not give this instruction. It covered one of the principal features of the case whereby defendant had hoped to win.

## VI.

### **VERDICT.**

There was a verdict for \$2500 in favor of both plaintiffs. Our contention is that in a case of this character such a verdict is improper and that the court should have required the jury to have returned a separate verdict as to each of the plaintiffs. As it is, it is impossible to tell how much the jury gave to each of the plaintiffs, or whether they intended to give it all to one and none to the other, consequently it deprives the defendant of the opportunity of raising the question of excessive verdict. We may be willing to concede that if the verdict were for equal amount to each of the plaintiffs, it would not be excessive as to either; but if the verdict had been all or nearly all for one plaintiff, we would insist that it was excessive.

In the case of *Fogarty v. N. P. Ry. Co.*, 74 Wash., 397, such a verdict was returned by the jury, and because thereof the Supreme Court of the State of

Washington remanded the case for a new trial. The court, in part, said:

“It was also error to direct the jury to assess the damages in a single sum. The jury might have found, as between the widow and child, they did not sustain an equal financial loss, or they might have found that one sustained such a loss while the other did not.”

In the case of *Gulf, Col. & Santa Fe R. Co. v. McGinnis*, 228 U. S., 173, (57 Law Ed., 785), the same question arose, where the same kind of a verdict was considered by the United States Supreme Court.

It is true each of the cases above cited was with reference to the Federal Employe's Liability Act, but the reasons given in those cases should be as applicable to the case at bar as to those cases.

The defendants in error may, however, take the position that such a verdict is good as against the defendant if there was no request for a several verdict. But there was in this case that which was equal to a request for a several verdict.

On pages 84 and 85 of the record is contained an instruction by the court which in substance directed the jury to find a joint verdict in favor of the plaintiffs if any verdict at all in their favor was returned. There the court said:

“The order in which you would naturally take up the consideration of these issues would

be, first, to determine what, if any, relationship this boy and this woman bear to the deceased. If there is a fair preponderance of the evidence that one was the wife, and is today the widow, and that the other was the son, then the next step would be logically to determine whether the deceased himself contributed in any way proximately to his own death, by his own negligence."

The defendant excepted to this instruction on the ground "that no damages could be awarded to the minor; and also upon the ground that damages could not be united in one verdict for both plaintiffs jointly." (R. p. 96).

At another place the court instructed the jury as follows:

"If you find that the defendant was so negligent, by a fair preponderance of the evidence, you would then pass to what recovery should be awarded the plaintiffs in this case. In assessing the amount of recovery, you would not be influenced by any sentimental considerations and you would not allow any damage for merely grief, or injury to the feelings which may have resulted from the loss of the parent, but you would confine your verdict to such an amount as would fairly compensate the plaintiffs in this cause for the death of the deceased Penso."

To which instruction the defendant at the time took exceptions in the following words:

"Upon the ground that no damages could be awarded to the minor, in any event, under the proof in the case; also upon the ground that damages could not be united in one verdict for both plaintiffs jointly." (R. p. 96, 97).



It will thus be observed that the defendant objected to a joint verdict and in substance requested a several verdict as to both plaintiffs.

We respectfully submit that the judgment of the lower court should either be reversed and the cause ordered dismissed, or be reversed and remanded for a new trial.

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NO. 2739

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United States  
Circuit Court of Appeals

For the Ninth Circuit

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OREGON-WASHINGTON RAILROAD & NAVI-  
GATION COMPANY, a Corporation,  
*Plaintiff in Error.*

—VS.—

ESTHER ROMI PENSO and BENSOIR PENSO,  
by his Guardian *Ad Litem* LEON BENEZRA,  
*Defendants in Error.*

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Brief of Defendants in Error

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Brief of Defendants in Error

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I.

STATEMENT OF THE CASE.

There are portions of the statement made by counsel for appellant which are incorrect and certain omitted statements of fact which we shall make.

The deceased and the witness, Theo. Balabanas, had worked together at the Coates Shingle Company, for more than a year. They crossed the railroad



bridge every night. On the night of the accident they left the mill at fifteen minutes to six. They were on the bridge at six o'clock. They had never before met a train while crossing the bridge. It was raining hard, was windy and dark (R. p. 49). The night was very dark and it was raining and it was windy, and blowing strong (R. p. 52).

The witness, Balabanas, and the decedent, had almost reached the west end of the bridge. Penso was within twenty-four feet of the west end of the bridge on the up-river side (R. p. 38). Counsel for the plaintiff in error has fallen into the curious error that the decedent was about half way across the bridge, at the time the witness Balabanas saw the light of the car. All the witnesses agreed that at this time the decedent was close to the west end of the bridge.

Witness, Balabanas, saw the light of the car. He went over and dropped onto an iron post on the bridge. This post was the up-right post nearest the west end of the bridge near the up-river side and was about twenty-four feet from the end of the bridge. After the witness saw the light of the car and had moved to the post, he put his arm around it. Witness had walked four or five feet (steps) after

he saw the car coming (R. p. 39). The decedant was between him and the end of the bridge, showing that at the time the light of the car was first seen by the decedant and the witness Balabanas they were very close to the westerly end of the bridge.

Witness Lucky, corroborates this. He got down on the side of the bridge, twenty-five feet west of the center. He saw (a man) ahead of him. Balabanas and the decedant were certainly between that point and the westerly end of the bridge.

The witness, Hendricks, also corroborates this. He states that just as soon as the engine entered the straight track it showed on the bridge. It was two hundred and ninety or three hundred feet from the curve to the bridge. He stated that on the evening of the accident the witness could see the full length of the bridge when he got around the straight part of the track. That he could see from the curve along the straight stretch of track, 290 feet to the bridge. That he could *see* clear through the bridge. (R. p. 53.54). He was looking to observe if anyone was on the bridge (R. p. 54). When he first saw the decedant, he was distant about three hundred feet; he was in the center of the track.

When the decedant had passed beyond the last upright, the defendant's gas car, approaching from the west, came in view. As it rounded the reverse curve near the end of the bridge its light was thrown upon th bridge and was discovered by witness Bala-banas and presumably by decedant. The gas car was not equipped with a standard head-light, such as is used on steam locomotives (R. p. 51). It was equipped with an air whistle (R. p. 52). The head-light of the gas car was located down over the cow-catcher. (Defendant's Exhibit "G"). (R. p. 51).

The gas car could be operated at a very high rate of speed. It is different from the operation of a steam train in that it picks up and gathers speed very quickly and could be stopped much more quickly than the ordinary train (R. p. 50).

The motorman in charge had been operating this gas car for ten days (R. p. 50). At a rate of six miles per hour the car could be stopped in ten feet (R. p. 69). When the motorman, Rendricks, rounded the curve, three hundred feet away, he discovered decedant o nthe track (R. p. 48). He made no effort to stop the car. (He stated he assumed the man would get away) (R. p. 55). When the man tried to make his get-away or something like that he was about twenty-five feet from the end. There was no

place where the decedant could have reached the place of safety except the platform at the end of the bridge (R. p. 39-40).

The decedant had one foot on the rail, and one on the platform. There was no other place of safety, except that toward which he was running. At this point he was struck by the car and knocked into the river. *The car ran thirty-eight feet, half its length, after striking him.* The car was seventy-six feet long (R. p. 68). The middle of the car was stopped opposite the place where the decedant was struck (R. p. 69). Half the car was on the bridge (R. p. 55).

The motorman knew that a great many people were accustomed to pass back and forth across the bridge (R. p. 54). That he had seen more than a dozen at one time, (R. p. 56). Some of them would step down into the clear, some would be on the platform. Others would hang onto the steps. (R. p. 56). That people were seen there every once in a while. (R. p. 49). That he never saw any other men on the bridge that night until after he stopped the car and got out in front, then there was a great number (R. p. 55).

The bridge in question belongs to the Northern Pacific Railway Company. For many years it has



been used by foot passengers at this hour of the day. It was regularly turned for their accommodation. At one time a charge had been made to foot passengers but this had been discontinued (R. p. 36). Hundreds of people were accustomed to pass over this bridge every day, men and women. Stairs and platforms had been arranged for their accommodation (R. p. 26, 27, 28, 29 and 30).

John G. Girard, for plaintiffs, testified that he crossed the bridge twice a day for nearly ten years and observed others crossing the same bridge; that employees used to cross the bridge in the morning and when returning home. The employees of the plants on the east side habitually crossed the bridge. He testified he had seen about one hundred people preparing to cross the bridge at one time; that the bridge had been generally used for the purpose of travel during the last ten years (R. p. 25). While the main part of town was on the west side of the river, there were lots of people living on the east side of the river (R. p. 26).

E. C. Taylor, one of the operators of the motor car, on behalf of defendant, testified that he knew that persons were in the habit of crossing the bridge in the night time; that he had seen people crossing there when the car was going through. That gen-

erally when the car crossed the bridge during the evening there would be people crossing or about to cross the bridge; that he knew that men after leaving their work were in the habit of using the bridge for the purpose of going to the other side of the river where they lived (R. p. 68).

William Anderson, conductor on the car in question, for defendant, testified that he had crossed over the bridge before when people were on the bridge many times; that he knew that employees on the east side of the river were in the habit of crossing over the bridge in going to and from their work (R. p. 65).

J. W. Dunn, on behalf of the defendant, testified that he met the motor car on the bridge on one occasion, while he was crossing; that he had seen other people crossing the bridge when the motor car was crossing; that during the two months he had seen many people getting out of the way of the car crossing the bridge; that a man would be out of danger if he could get down on a plate, or stand on the end of the ties and lean against the up-right piece; that he would be in no danger of being hit by the car (R. p. 70-71).

A. L. Gabriel, on behalf of defendant, testified that he used to cross the bridge; that when he would

meet the car he would step to one side and wait for it to get by; that he would get down below the ties if met the car in the center of the bridge; that any time when he was not in the center of the bridge, he could get out of the way of the car; that persons crossing the bridge at the same time this motor car was crossing could get out of the way of the car and be in a place of safety.

He stated they could do this either by leaning up against the up-rights or getting down on the testle below; that he had seen men crossing the bridge about six o'clock in the evening meet the car; that these men would do likewise. He had seen a good many people meet the trains while they were on the bridge; that he never knew of any one being hurt (R. p. 72).

Mr. Gabriel also testified that if a person met the car while crossing the bridge and either got down or should stand with his feet on the outer edge of the ties and lean up against the bridge work, he would be out of danger there also; that there were several plates upon which men could stand on each side of the bridge, but he did not know how many (R. p. 72-73).

Thos. Steier, on behalf of defendant, testified that he was in the habit of crossing this railroad bridge, using the bridge about once a day; that he

worked at the National mill from 1906 to 1911, and then went to work at the Eureka mill and had been working there ever since. Both mills are on the east side of the bridge. He crossed it in the morning about half past six and in the evening about five or ten minutes to six. He met the motor car a number of times on the bridge.

When he met the car he would hold himself to the iron bars. If one met the motor car while he was on the bridge, he could get into a place of safety by stepping on the ties first and then he could step down to the trestle and be safe between the iron bars. That he would be safe if he got his feet on the outer edge of the ties and leaned up against the frame work. He had seen quite a few people understaking to cross the bridge at the same time the car was crossing. These people, to get out of danger, would do the same thing, step to one side of the ties or down to the trestle of the bridge. He never knew of any person during all these years who had been crossing there, being hurt (R. p. 74).

Christ Zurbas, a witness for plaintiff, testified that he was on the bridge the night Penso was killed. He had been working at the National mill. He had crossed the bridge every night for four months. There were other persons on the bridge at that time. There



were from fifteen to twenty-five. He could not tell the actual number. Many men from the other mills were in the habit of crossing the bridge after they had quit work at night (R. p. 42).

According to the testimony of Balabanas, who was twenty-five feet from the point of the accident, no whistle was blown and no bell was rung (R. p. 38-39).

## II.

### MOTION FOR NON-SUIT.

In the State of Washington a motion for non-suit is waived by introducing evidence on behalf of defendant. Error can not be predicated upon a denial of a motion for non-suit in this State unless defendant stands upon its motion.

See:

*Parker v. Washington Tug & Barge Co.*, 85 Wash. 575-580;  
*Alkire v. Myers Lbr. Co.*, 57 Wash. 300;  
*Ryan v. Lambert et al*, 49 Wash. 649;  
*Adams v. Peterman Mfg. Co.*, 47 Wash. 484-486.

The District Court will follow the State court's practice.

See:

*Coughran v. Bigelow*, 164 U. S. 301-311;  
 41 L. Ed. 446;

*Central Transportation Co. v. Pullman Palace  
Car Co.*, 139 U. S. 24-61;  
35 L. Ed. 61.

This disposes of the motion for non-suit.

### III.

## MOTION FOR DIRECTED VERDICT.

The motion for directed verdict was properly denied. In considering a motion for directed verdict, the court will, of course, consider all the evidence both for plaintiff and defendant. A verdict will not be directed where the conclusion does not follow as a matter of law that no recovery can be had upon any view which can be properly taken of the facts, that the evidence tends to establish.

See:

*Dunlap v. Northeastern Ry. Co.*, 130 U. S.  
649;  
32 L. Ed. 1058;  
*Texas & P. R. Co. v. Cox*, 145 U. S. 593;  
36 L. Ed. 829.

If reasonable minds might reach different conclusion upon the facts shown, the case should be submitted to the jury..

## IV.

**NEGLIGENCE OF THE DEFENDANT.**

We shall consider, firstly, the question as to whether there was sufficient evidence of the defendant's negligence, and secondly, whether the question of contributory negligence was properly submitted to the jury.

Counsel seem unable to find any testimony in the record which even tends to show that the defendant was guilty of any neglect causing Penso's death.

It was the duty of the person operating this motor car to keep a reasonable look-out for persons upon this bridge, and to use reasonable care to prevent injury to any one upon the bridge who might be crossing it as the car was being operated across the bridge. It was the duty of the person operating the motor car, if he discovered any one upon the bridge in apparent danger of injury, to use reasonable care to avoid injuring such person. It was the duty of the person operating such motor car to operate such car at such rate of speed in approaching such bridge, that he could, in the exercise of ordinary care, prevent injury to any person thereon. It was also his duty as he approached such bridge to give proper warnings of the approach of such motor car to the

persons on such bridge that the motor car was approaching.

The court instructed the jury, which was not excepted to, as follows:

“Where the operators of a car have reason to anticipate that there may be pedestrians on the track, it is their duty to use reasonable diligence and reasonable and ordinary care to give warning of the approach of their car so that those pedestrians whom they have reason to anticipate are on the track may have reasonable opportunity to get out of the way, and if they fail to use ordinary care in the speed at which they operate the car, or the warnings which they give, or the lookout which they keep to advise those whom they may have reason to believe are using the way as a foot-path, for them to get out of the way, they would be negligent.” (R. p. 82).

The court also instructed the jury concerning the duty of the defendant, as follows:

“It is as much the duty of the pedestrian traveling along a highway or any place used as a highway to use his sight and hearing, as it is for the engineer of an approaching train to keep a lookout for danger, and if the engineer of the car saw the plaintiff walking in the ordinary and customary way upon the track, it was not the duty of the engineer to stop the car on account thereof, but he had the right to assume



that the party walking upon the tracks, as disclosed by the evidence, would himself get out of the way of the approaching train or car, unless there was something in the situation to advise the engineer that it would be unsafe to do so." (R. p. 87-88).

The evidence shows that Penso had passed the last up-right on the west side when the car came around the curve about three hundred feet from the bridge. The car was approaching at such a rate of speed that Penso could not make the west platform, some twenty-five feet away, before the car struck him. If this car was not going at a reckless rate of speed, with the knowledge that all of the persons operating the train had, as their own testimony shows, that persons were likely to be on the bridge, we don't know how much faster a car would have to go to be going at an excessive rate of speed.

Respondents took the humane view of the situation and alleged in their complaint that the motorman did not keep a reasonable lookout for persons on the bridge, although knowing they were likely to be thereon, as he approached the bridge. However, the motorman himself testified that he actually saw Penso, when he was three hundred feet away. It is true he testified that Penso was off to one side and got on to the middle of the bridge in front of the

car too late for him to stop, but the testimony of Balanas, who was with Penso, is that he never got off on one side of the bridge at all, but commenced running toward the west platform.

If the jury believed that Penso did not get off on one side of the bridge, as the motorman testified, but ran along the middle of the bridge toward the platform as Balanas testified, and believed that the motorman saw Penso three hundred feet away, there certainly could be no question of the negligence of the defendant. The jury could believe either one or two things, the motorman did not keep a reasonable lookout, or if he did see Penso, did not use reasonable care in operating the car after he saw him. Under either view, there was sufficient evidence of defendant's negligence to go to the jury.

It is urged that there was no evidence that the bell was not rung or the whistle blown as the motor car approached the bridge. Balabanas testified that he did not hear the bell rung or the whistle blown. It was the duty of Balabanas to use ordinary care as he crossed the bridge in listening for the approach of a train. The cases cited by Appellant are cases where a person testifying was under no legal duty to listen and was not in a position where it could

be said with reasonable certainty that his failure to hear was evidence that the bell was not rung or the whistle blown.

The evidence in this case shows that if the whistle was blown it could have been heard about a quarter of a mile away. In view of the fact that Balabanas owed a duty to listen, his testimony that he did not hear a bell or whistle blown, was evidence of the fact that the bell was not rung or the whistle sounded.

See:

*Franchisa v. Chicago etc. R. Co.*, 195 Fed. 462.

It is urged that whether the whistle was sounded or bell rung was immaterial because the evidence shows that Penso could see the headlight three hundred feet away, as the car rounded the curve. The evidence, however, shows that the car was going so fast that he could not make his only place of safety after he saw the headlight on the car. So that had a bell been rung or the whistle sounded before the car rounded the curve, Penso would have had an opportunity to have gotten to a place of safety before the car struck him.

It was for the jury to say whether the motor-man, in the exercise of ordinary care, with a head-

light showing upon the bridge, affording him a clear view, seeing Penso running for the west platform, should have known that this was his only place of safety, as he had passed the last upright to which Penso could look for safety.

Although the evidence shows that there was defendant's witness, Louis Lucky, (R. p. 59), and plaintiffs' witnesses, Balabanas (R. p. 37), and Christ Zurbas (R. p. 42), and at least fifteen others (R. p. 42) on the bridge at the time of the accident, yet the motorman saw only one person on the bridge, according to his testimony (R. p. 48). This shows he was not keeping a reasonable lookout. The jury could have come to a reasonable conclusion that he did not see Penso. He was operating the car up to the bridge at an excessive rate of speed and without any warning of his approach.

It was his duty to operate the car at a reasonable rate of speed and to give proper warnings under the circumstances necessary to afford reasonable protection to persons on the bridge, is sustained by the following cases:

*Great Northern Ry. Co. v. Thompson*, 199  
Fed. 395.

*Thompson v. Northern Pacific*, 93 Fed. 384.



In any event the court did not err in refusing a directed verdict for the defendant, as the evidence shows that the defendant had the last clear chance to save Penso from injury. The motorman testified he could stop the car in ten feet at the rate of speed he was going. He did not actually stop it within less than about thirty-five feet. He testified he saw Penso three hundred feet away. Balabanas testified that Penso was running towards the west platform and did not get off on to the side of the bridge as the motorman testified.

Under the facts, the jury could have applied the doctrine of the last clear chance had it been submitted to them. The fact that the court did not submit that question to the jury does not affect the question as to the sufficiency of the evidence to entitle plaintiffs to submit the cause to the jury.

## V.

### **CONTRIBUTORY NEGLIGENCE.**

It is urged deceased was guilty of contributory negligence as a matter of law. It is stated that deceased knew that a train was liable to cross the bridge at almost any moment, and that it is fair to presume deceased knew of the schedule of this motor.

car. There is no evidence that deceased knew this. The evidence of Balabanas, who went with him home over that bridge nightly, is that he did not. Neither of them knew anything of any schedule. They had never previously been on the bridge when a train crossed.

Suppose that deceased did know a train was expected any moment. Any one on a railroad track or bridge could in a sense be said to expect a train at any moment. But this does not make the person guilty of contributory negligence. If so, in every case contributory negligence would defeat recovery.

It is said deceased knew there was a platform on the easterly end of the draw span, one in the middle and another on the westerly end, where deceased could stand in perfect safety. Standing on a platform on the east side would not get deceased across the bridge. He had as much right to go from the center platform to the west platform as from the east platform to the center platform.

When the motor car was first seen deceased about twenty-four feet of the west platform. He had passed the only place to step to one side and was running for the west platform. He was just in the act of stepping on to it when he was struck.

Counsel persist in stating that deceased was in the middle of the bridge when struck. This is true in a sense. He was walking between the rails on the planks and tin laid in the middle, but had passed the last plate and upright girder when he saw the car. Balabanas, coming behind Penso stepped on this plate for safety. Penso started running to the west platform. The car was about three hundred feet away. It was going at such speed it beat Penso to the west platform.

The assertion that Penso had half the length of the bridge to go while the car went three hundred feet, is contrary to the evidence. This contention is built upon Balabanas' statement he was in the middle of the bridge when he saw the car. He meant between rails, not half way across the bridge. Balabanas marked post on Plaintiffs' Exhibit 7, which he got hold of, pointing to upright post nearest the west end of the bridge.

It is said deceased negligently and carelessly, in disregard of his safety, undertook to beat the car to the end of the bridge, at a time when he had ample opportunity to have gotten on a platform at the middle of the bridge. The fact is, Balabanas was behind deceased four or five feet from the last upright when he saw the car and deceased was beyond

the last upright. So Balabanas' only place of safety was the upright and Penso's the west platform. This he made for but lost by a small margin.

Counsel think Penso should have turned around and run back. We are to judge the situation, not as we see it now, but as it might occur to Penso then. With a car three hundred feet away, if the car had been operated at a reasonable speed, he would have made it. He could not have made the next upright beyond the one Balabanas seized, for it was farther away than the west platform. Certainly Penso did what then occurred to him best to save himself. That he knew he was in danger is shown because he ran. The most that could be urged would be an error of judgment *in extremis*.

Counsel cite *Texas Midland R. Co. v. Byrd*, (Tex) 115 S. W. 1163, and urge that this bridge was reasonable safe or unsafe for foot passengers; that if there was no way to get out of danger then deceased was negligent because he undertook to walk across the bridge; that if there were places (as the evidence conclusively shows) where he could have gotten out of harm's way, then his duty was to have done so.

That the bridge was reasonably safe for travel is shown by the fact that it had been used for about



ten years by sometimes hundreds daily, without any person getting injured thereon. So Penso was not guilty of contributory negligence in using the bridge. While it was reasonably safe, it was not absolutely safe. If a train was operated at a reasonable rate of speed and reasonable warning of the approach of a train given, neither of which was done in this case, a person anywhere on the bridge could get to a place of safety. Penso would have made the distance from the last upright to the west platform under conditions of reasonable care on the part of the defendant. At the speed the car was being operated, and without warning in time, going at such speed, Penso couldn't make it, that's all.

In the case of *Great Northern Railway v. Thompson*, *supra*, this court said:

“The question of contributory negligence is a question of fact, to be passed upon by the jury whenever the undisputed facts are such that different minds might reasonably come to different conclusions as to the reasonableness and care of the injured party's conduct. If the evidence is such as to leave the mind in a state of doubt on the subject, the case should not be withdrawn from the jury. These principles are so well established as to require the citation of no authority. It may be added that the question whether or not the person injured is guilty

of contributory negligence may often depend upon a variety of considerations. The question is not always answerable by pointing to the fact that the injured party might have used a safe way. Whether a reasonably prudent person would have taken the safe way may depend upon the situation and the circumstances, the accessibility and the proximity of the safe way, the extent of the public travel on the chosen way, the frequency of the passage of trains over it, and alertness in looking for passing trains."

See also:

*Young v. Clark* (Utah), 50 Pac. 832.

This bridge had been prepared for public use, and had been used daily for over ten years. The deceased and Balabanas had crossed this bridge for years and had never encountered a train on the track. Witnesses for the defense testified to the practical safety of the bridge even while the train was being operated across it at a reasonable rate of speed. If the car had been operated with ordinary care, Penso would have gotten to a place of safety.

## VI.

### REQUESTED INSTRUCTION.

The defendant requested the court to instruct that as the testimony disclosed that the engine had a headlight burning, that the question whether the

bell was rung was immaterial, and that the jury could find no negligence based on the fact the bell was not rung. The court did instruct as follows:

“You will understand that if the deceased saw, or knew in any *way* that that car was coming, the failure to give a signal of the approach of the car would not be a proximate cause, because the only way in which failure to give a signal would be a proximate cause of the injury would be that if it had been given it would have warned the man of the approach of the car, but if he knew it, without a signal why it would not be necessary to warn him.” (R. p. 85).

In the case of *Young v. Clark*, (Utah), 50 Pac. 834, the court said:

“Just before the bridge was crossed, the train was running at a high rate of speed for such a locality. Failure to ring the bell or blow the whistle before crossing the bridge had a bearing upon the charge that the defendant ran its train recklessly, and as tending to show negligent conduct on the part of the defendant at a time when a person was seen upon its track. While the failure to ring the bell or sound the whistle was not a proximate cause of the injury, yet it was one of the means that could have been used by the engineer to warn the plaintiff of approaching danger from the time she was first observed upon the track.”

The fact that there was a headlight, at the speed at which this car was being operated, did not afford Penso a reasonable opportunity to escape. Had the bell been rung or the whistle blown before the car rounded the curve some three hundred feet away, Penso would have had a warning in time.

## VII.

### REQUESTED INSTRUCTION.

The requested instruction that the evidence showed that deceased for a long period of time prior to the accident had traveled in the morning over a bridge across the river at some distance from where the railroad bridge was operated, was a circumstance to be considered in determining whether defendant was guilty of contributory negligence, was properly refused.

There was no testimony that deceased had ever used any other bridge than the railroad bridge in going to and from his work. Neither was there any testimony showing that he could go to or from his work by any other way; or that, if he could, that any other way was practical. The instruction, assumed facts that were not shown by the evidence. The court was justified in refusing to give this instruction.



In the discussion of this instruction, the court will observe that counsel does not cite to any place in the record where there is any testimony that Penso had ever crossed any other bridge in going to or from his work. There was no evidence of another convenient and less dangerous way home.

In the case of *Young v. Clark*, (Utah), 50 Pac. 834, the court said:

“Defendants would be responsible for negligently injuring deceased through their active intervention. Even if she were a trespasser providing at the time of the accident she was in the exercise of ordinary care, and they knew of her presence in a dangerous situation, or *failing to exercise due care to discover her presence* in such a situation when circumstances existed which would put a person of average prudence upon inquiry, *her presence upon the premises would then be a mere condition*, and not a contributing cause.”

## VIII.

### REQUESTED INSTRUCTION.

Defendant requested the court to instruct that if the jury believed from the evidence that it was dangerous to undertake to cross over the bridge at the same time a car was crossing the same, and they believed that deceased knew, or by the exercise of

reasonable care should have known, that he would meet the motor car on the bridge, then the deceased would be guilty of such contributory negligence and assumption of risk that would defeat any recovery for plaintiffs.

In the first place, it was the theory of both plaintiffs and defendant that it was not dangerous to undertake to cross over the bridge at the same time a car was crossing the same. The defense offered many witnesses to show actual experiences of meeting the train on the bridge, both by the train crew and persons caught on the bridge.

In the second place, under the facts, it was a question for the jury to say whether it was sufficiently dangerous, even if deceased knew, or should have known, that he would meet the motor car or train on the bridge, to make him guilty of contributory negligence or assumption of risk. The court could not instruct the jury regardless of the extent of the danger that deceased would be guilty of contributory negligence if he had reason to expect a train was coming.

Then again, Balabanas testified that he had always accompanied Penso home from work, as they worked together, and that they had never encountered a car upon the bridge while they were cross-

ing. No witness was called on behalf of the defense to show they had ever been on the bridge when a car passed over.

Even if they had expected a car, under the evidence on behalf of the defense as to the ease with which the car could be operated across the bridge with persons thereon, it would have been a question for the jury, under all the circumstances, whether the deceased was guilty of contributory negligence or assumed the risk.

Counsel says it can not be said that a man would be using reasonable care and caution to undertake to cross over this bridge when he knows that in all probability he will meet a train thereon. Then there must have been hundreds of men who have passed over this bridge who were very careless, in the eyes of counsel, notwithstanding the evidence of, defendant's own witnesses and the persons in charge of the motor car, that it was customary to find persons on the bridge.

## IX.

### VERDICT.

Counsel contend that the verdict cannot stand because it was joint verdict. While they cite *Fogarty*

*v. Northern Pacific etc. Co.*, 74 Wash. 397, and *Gulf etc. Co. v. McGinnis*, 228 U. S. 173, they omitted to cite the cases of *Central Vermont R. Co. v. White*, 238 U. S. 506, 59 L. Ed. 1433, and the case of *Lebovitz v. Cogswell*, 83 Wash. 178, which completely explode the contention of counsel.

For the foregoing reasons we respectively submit that the cause should be affirmed.

Respectfully submitted,

F. L. MORGAN,

L. H. BREWER,

A. EMERSON CROSS,

Attorneys for Defendants in Error.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING COMPANY,  
a corporation, and Its Manager and Editor,

WILL A. CAMPBELL,

INDEPENDENT PUBLISHING COMPANY, a Corporation,  
and Its Manager and Editor WILL A. CAMPBELL,  
Plaintiffs in Error,  
vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

Transcript of Record.

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UPON WRIT OF ERROR TO THE UNITED STATES DIS-  
TRICT COURT OF THE DISTRICT OF MONTANA.

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Filed

JAN 24 1916

F. D. Monckton,  
Clerk.

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No.....

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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In the Matter of the Contempt of the  
**INDEPENDENT PUBLISHING COMPANY,**  
a corporation, and Its Manager and Editor,  
**WILL A. CAMPBELL,**

*Plaintiffs in Error*  
*and Respondents.*

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**Transcript of Record.**

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**UPON WRIT OF ERROR TO THE UNITED STATES DIS-**  
**TRICT COURT OF THE DISTRICT OF MONTANA.**

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## **Names and Addresses of Attorneys of Record.**

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for the United States, of Butte, Montana.

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*In the District Court of the United States, District  
of Montana.*

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In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING COMPANY,  
a corporation, and Its Manager and Editor,  
WILL A. CAMPBELL.

**BILL OF EXCEPTIONS.**

BE IT REMEMBERED, in the above entitled proceedings, in the above entitled court, that an information was filed on the 29th day of November, 1915, which said information, in words and figures, is as follows:

(TITLE OF COURT AND CAUSE.)

United States of America,  
District of Montana.—ss.

At the special term at Helena of the United States District Court for the District of Montana, in the year of our Lord one thousand nine hundred and fifteen, beginning on the 15th day of November, A. D. 1915, leave of court being first had and obtained, comes Burton K. Wheeler, United States Attorney for the district of Montana, and informs the court:

That at the said special term, in the year of our Lord one thousand nine hundred and fifteen, of the said district court of the said United States for the district of Montana, to-wit, on the 26th day of November, A. D. 1915, at the city of Helena, in the state

and district of Montana aforesaid, there came on to be tried in said court before Honorable George M. Bourquin, then and still judge of said court, and a jury duly impaneled and sworn for that purpose, a certain issue in due manner joined between the United States of America and one W. T. Poe, alias J. C. Cross, upon a certain criminal indictment then pending in said court against said W. T. Poe, alias J. C. Cross, for having wrongfully, unlawfully and feloniously devised an artifice or scheme to defraud E. C. Carney and Company, a co-partnership composed of E. C. Carney and L. F. Carney, of Williston, North Dakota, of certain moneys, and in furtherance of said scheme had placed or caused to be placed in the post-office of the United States at Harlem, Montana, a certain letter on or about the 13th day of August, A. D. 1915, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America; that at the time of the adjournment of said court, and while said cause was still pending and undetermined and the trial thereof in progress, to wit, at or about the hour of fifteen minutes after five o'clock in the afternoon on said 26th day of November, A. D. 1915, the court duly admonished the jury as to its conduct during the adjournment of said court, and adjourned said court and the trial of said cause until ten o'clock in the forenoon of the 27th day of November, A. D. 1915, and said jury separated and went to their respective places of abode, in the said city of Helena, Montana;

That The Independent Publishing Company is a corporation duly organized, existing and doing business under the laws of the state of Montana, in the city of Helena aforesaid, and Will A. Campbell is the editor and manager of said corporation, and said Independent Publishing Company publishes and edits a daily morning paper in said city of Helena, known as and called "The Helena Independent;" that the said newspaper, "The Helena Independent" is the only morning newspaper published in said city and has a large circulation in said city of Helena and elsewhere and is edited and managed by said Will A. Campbell, who is the manager of said Independent Publishing Company; that on the morning of said 27th day of November, A. D. 1915, at or about the hour of six o'clock a. m., said Independent Publishing Company and the said Will A. Campbell, at the city of Helena, aforesaid, published, issued, circulated and distributed, and caused to be published, issued, circulated and distributed the regular daily issue of the said newspaper "The Helena Independent" for the said 27th day of November, A. D. 1915, which said issue of said newspaper so published, issued, circulated and distributed as aforesaid contained an article as follows, to wit:

"SLICK" MR. POE  
IS NOW ON TRIAL.

---

Former Auditor of North  
Dakota City, Ex-Convict,  
Charged with Fraud.

---

## HAS BEEN IN MUCH TROUBLE

Was sentenced to 32 Years for Em-  
bezzlement in North Dakota and  
gets in Trouble Shortly After  
He is Paroled From Prison.

---

W. T. Poe, former city auditor of Williston, North Dakota, ex-convict, homesteader and alleged forger, was placed on trial in the federal court yesterday to answer an indictment charging him with using the mails to defraud. The government got under headway with its presentation of the evidence against the defendant yesterday afternoon and the case is expected to go to the jury some time today.

Poe is charged with using the United States mails to defraud E. C. Carney and company of Williston, North Dakota. It is alleged in the indictment that Poe, under the alias of J. C. Cross, secured a loan from Carney and company of \$300, giving a mortgage on the farm of Alf Larson. Poe, it is alleged, forged the name of Larson to the checks sent him by the Carney Company.

## JUGGLED CITY FUNDS.

Poe was city auditor of Williston, North Dakota, for nearly four years. A little more than two years ago he was caught in a number of for-



geries and embezzlements, it is said, and was sentenced to an aggregate of 32 years in the penitentiary of North Dakota. His sentences would have been in part concurrent and would have given him a total of 12 years in prison. One embezzlement of which Poe was convicted was the raising of a \$1.50 check to \$1,500. North Dakota officials who are here to testify for the government say that Poe destroyed many of the records of his office before his peculations were uncovered.

After Poe had been in the North Dakota penitentiary for two years he was given a parole after his wife had worked incessantly in his behalf. His wife had previously come to Montana and taken up a homestead and he was allowed to leave North Dakota under his conditional pardon on condition that he was to come to the Montana homestead and live a quiet life with his wife.

#### OTHER ALLEGED WRONGS.

Other alleged shady acts on the part of Poe are now under investigation in the eastern part of the state, say the officials. It is also stated that Poe, who is a young man, comes of good people in North Carolina, but escaped prosecution in his native state on his promise to leave North Carolina and remain away for good.

In the present trial Poe is being defended by Attorney W. W. Patterson. United States Attorney B. K. Wheeler and Deputy Attorney Homer G. Murphy are prosecuting the case.

The jurors are John Pearson, H. M. Ogden, F.

H. Dean, George W. Hart, W. S. Marshall, Frank A. Fellows, John Dorfler, E. L. Fiske, W. H. Ogle, V. L. Hagman, R. G. Dixon and W. D. Niel.

That said ~~article~~ so appearing in said issue of the said newspaper, to wit, "The Helena Independent" was not based upon facts adduced on the trial of said cause and was and is an obstruction of and an interference with the due administration of justice in and a contempt of said district court of the United States for the district of Montana, in this, that said article was written and published for the purpose of giving to the public generally and to all persons who read said newspaper and the said article certain facts relating to the past life of the said W. T. Poe, alias J. C. Cross, and particularly inform said jury or the members thereof then and there impaneled to try the said cause, who might read said newspaper and said article, certain facts about said defendant, W. T. Poe, alias J. C. Cross, that were highly prejudicial to his character and reputation and would when read by said jury or any members thereof tend to bias and prejudice them against said W. T. Poe, alias J. C. Cross and prevent the said jury and the members thereof who had read said article from giving the said W. T. Poe, alias J. C. Cross, a fair and impartial trial for the reason that it brought to their attention certain facts concerning the life of the said W. T. Poe, alias J. C. Cross, that were not material to the issues of said cause and could not be proven on the trial of said cause against

said W. T. Poe, alias J. C. Cross, unless he on the trial of said cause had taken the witness stand in his own behalf, or place his good character in issue.

That at the hour of ten o'clock in the forenoon of said 27th day of November, A. D. 1915, at which said court convened and the trial of said cause was resumed, it appeared to the court that certain members of said jury had read said article so written and published in said issue of said newspaper, "The Helena Independent" by the said Independent Publishing Company and Will A. Campbell, and by reason thereof had been informed and advised of the alleged facts so published about the said W. T. Poe, alias J. C. Cross, and his life and reputation, and it further appeared to the said court that said W. T. Poe, alias, J. C. Cross, could not by reason of the facts aforesaid have a fair and impartial trial by said jury, and said court by reason thereof was upon the request and consent of the said W. T. Poe, alias J. C. Cross, compelled to discharge said jury from further considering said cause and continue the trial thereof, and remand the said W. T. Poe, alias J. C. Cross, to the custody of the United States Marshal for the district of Montana, until said cause can hereafter be tried;

That the publication, issue, circulation and distribution of said newspaper on said 27th day of November, A. D. 1915, containing said article, by the said Independent Publishing Company, and the

said Will A. Campbell, was for the reasons aforesaid an obstruction of and interference with the due administration of justice in said court and cause on trial as aforesaid, and a contempt of said court.

WHEREFORE it is prayed that a citation issue out of this court directing the said Independent Publishing Company and Will A. Campbell, Manager and Editor thereof, to show cause on a day certain before this Honorable Court why they and each of them should not be adjudged in contempt hereof.

BURTON K. WHEELER,

United States Attorney for the District of  
Montana.

UNITED STATES OF AMERICA,

District of Montana.—ss.

Burton K. Wheeler, being first duly sworn, deposes and says that he is the duly appointed, qualified and acting United States Attorney for the district of Montana; that he has read the foregoing information in contempt and knows the contents thereof, and the same is true to the best of his knowledge, information and belief.

BURTON K. WHEELER,

SUBSCRIBED AND SWORN TO before me  
this 29th day of November, A. D. 1915.

GEO. W. SPROULE,

Clerk U. S. District Court, District of Montana.



Thereupon, on said date a citation was issued upon said information, which said citation, in words and figures, is as follows:

(TITLE OF COURT AND CAUSE.)

THE PRESIDENT OF THE UNITED  
STATES OF AMERICA:

To The Independent Publishing Company, a corporation, and Will A. Campbell, GREETING:

You, and each of you, are hereby commanded to be and appear before the District Court of the United States for the District of Montana, at the court room of said court in the Federal Building, in the city of Helena, County of Lewis and Clark, said district, on Wednesday, the 1st of December, A. D. 1915, at 10 o'clock A. M., then and there to show cause, if any you have, why you, and each of you, should not be punished for contempt for publishing in the Helena Independent, a daily newspaper at Helena, Montana, on the 27th day of November, 1915, a certain article about one W. T. Poe, alias J. C. Cross, then and there on trial in said court before said court and a jury, which article was calculated to excite prejudice against said defendant and prevent him from having a fair and impartial trial, thus obstructing and interfering with the due administration of justice in said court, all as more fully appears from the information herein a copy of which is hereto attached and herewith served on you.

Witness, HONORABLE GEORGE M. BOUR-

QUIN, Judge of the United States District Court, District of Montana, this 29th day of November, A. D. 1915.

Attest:

GEO. W. SPROULE, Clerk.

Thereafter, and before the first day of December, 1915, at the request of the Independent Publishing Company and Will A. Campbell, the said hearing was continued until the 6th day of December, 1915, the said named parties agreeing that the hearing should take place at the city of Butte, in said court, and on the 6th day of December, 1915, at said court in the city of Butte, the said named Independent Publishing Company and Will A. Campbell appeared and filed their answer to said information, which said answer, in words and figures, is as follows:

(TITLE OF COURT AND CAUSE.)

Comes now the Independent Publishing Company, a corporation by Will A. Campbell, its Manager and Editor, and the said Will A. Campbell in propria persona, the persons above named, and in response to the citation heretofore issued out of this Court in the said cause, directing them and each of them to show cause why they should not be adjudged in contempt, hereby respectfully show unto your honor as follows:

First. Respondents admit that the said Independent Publishing Company is a corporation organized, existing and doing business under the

laws of the State of Montana in the City of Helena, and engaged in publishing a daily morning paper in said city, known as the "Helena Independent," as set forth in the said citation. Respondents admit that the said Will A. Campbell is the Editor and Manager of the said corporation and has entire charge of the business of editing the said paper and was so employed on the morning of the twenty-seventh day of November, 1915.

Second. Respondents admit the facts set forth in paragraph one of the said citation relative to the proceedings in the case of the United States against W. T. Poe, and that the article set forth in the said citation appeared in the issue of the said newspaper on the morning of the twenty-seventh of November, 1915, and was not based upon facts adduced on the trial of the said cause, and that said article referred to the defendant then on trial, W. T. Poe.

Third. Respondents further answering the said citation, say: That the said newspaper is published at an early hour in the morning and that the material and copy therefor are prepared by reporters and edited by editors employed by the Independent Publishing Company and its said manager in the due course of business, and that a large portion of the contents of the said newspaper is furnished, prepared and printed at a late hour in the evening before the day of issue. That in his capacity as manager, the said Will A. Campbell exercised reasonable care in the selection and

employment of editors and reporters, and exercised reasonable care that articles reflecting upon the courts or in any manner tending to interfere with the due administration of justice, were excluded from the columns of the said paper. That on the evening of the twenty-sixth day of November, 1915, the said Will A. Campbell had left the office of the said Publishing Company at his usual hour, leaving the editorial management of the paper in charge of a person whom he believed to be fully competent to carry on the said editorial management, and fully conversant with the rules of conducting such business. That the article in question, as Respondents are informed and believe, was prepared by one of the reporters of the said newspaper, W. H. Perkins by name, and caused to be printed by the said Perkins without any editorial supervision and without the actual knowledge of the said Will A. Campbell. That the said Perkins, as Respondents are informed and believe, received the information upon which the article was based from persons upon whom the said Perkins relied and in the belief that the said statements were true and without any intent on the part of the said Perkins to in any manner interfere with the administration of justice in the courts or in violation of any of the rights of the said Poe, all of which will more fully appear by reference to the affidavit of the said Perkins, attached hereto and made a part hereof. That this Respondent, Will A. Campbell, had no knowledge of



the contents of the said article or of the intention of the said Perkins to cause the same to be printed prior to its publication in the said newspaper and that neither the said Will A. Campbell, nor any officer of the Respondent corporation had any personal connection with the publication of the said article or knowledge thereof, and in the publication thereof, had no intent whatsoever to interfere with the due administration of justice in this court or of any of the rights of the defendant Poe, then on trial. That these Respondents regret exceedingly the publication of the said article and have taken such steps as seem to be most efficient to prevent, in the future, the appearance in the columns of the said newspaper of anything whatsoever reflecting upon the conduct of this court or in any way interfering with the due administration of justice therein.

WHEREFORE, having fully answered, Respondents pray that the said citation may be set aside and the proceedings thereunder dismissed.

INDEPENDENT PUBLISHING COMPANY  
and WILL A. CAMPBELL.

By E. C. DAY and C. B. NOLAN,

Their Attorneys.

(Duly verified by Will A. Campbell.)

STATE OF MONTANA,

County of Lewis and Clark.—ss.

W. H. PERKINS, being first duly sworn, deposes and says:

I reside at the City of Helena, Montana. On the twenty-sixth day of November, 1915, I was employed by the Independent Publishing Company as a Reporter upon its paper, known as the "Helena Independent." I have read the article set forth in the citation heretofore issued out of this court against the said Independent Publishing Company, a corporation, and its Manager and Editor, Will A. Campbell. I am familiar with the said article. The same was prepared by me as a Reporter for the said Helena Independent on the evening of November twenty-sixth, 1915, between the hours of ten and eleven o'clock of the said evening. The facts set forth in the said article were obtained by me from Mr. Ed. Loveke, a gentleman who was in attendance as a witness upon the trial of the case against W. T. Poe. I was advised that this gentleman had been an Assistant States Attorney in the State of North Dakota and connected with the prosecution of the case in said State against the said Poe. From these representations and my conversation with the said gentleman, I was led to believe and did believe that he was familiar with the facts which he detailed to me, and with the procedure in court, and I published the said facts, in reliance thereon, without any intention on my part to in any manner interfere with the administration of justice in this court, and without any knowledge on my part that by the publication of these facts as thus detailed to me, either the newspaper or its editor, or anyone connected

with it would in any manner be guilty of any interference with the administration of justice in the said court or in contempt of court. That the published report is a full and true and fair reproduction of the facts as stated to me by the said gentleman, and were published by me in reliance upon the truth thereof as set forth by him. Owing to the lateness of the hour, the article was sent to the composing room without being censored or read by anyone, and without the knowledge of the Respondent, Will A. Campbell, the Managing Editor. That at the time of the preparation of the said article the said Will A. Campbell had left the office of the said paper for that day.

W. H. PERKINS.

SUBSCRIBED and SWORN to before me this 4th day of December, 1915.

E. C. DAY,  
Notary Public.

(Seal)

(Filed December 6, 1915.)

And thereupon the said matter was submitted to said court for final decision and judgment upon said information and said answer, and on the facts set forth in said information and answer, no evidence being introduced at said hearing, and thereafter on the 11th day of December, 1915, a memorandum decision and judgment was rendered against the said Independent Publishing Company and Will A. Campbell, which said judgment and decision, in words and figures, is as follows:

(TITLE OF COURT AND CAUSE.)

Respondents newspaper published a reference to and during a felony trial herein, which included purported past history, similar felonies, trials, sentences, imprisonment, parole, and exile to escape prosecution, of and by defendant. Brought to the court's notice and it appearing several jurors had read it, the jury was discharged, the trial ended, and by the court's order respondents were cited to show cause why they should not be adjudged in contempt. They answer the article was by their reporter believing it true, and was published without the knowledge of the respondent editor or any officer of the respondent corporation, without intent to obstruct the administration of justice, and that they "regret exceedingly" the publication and have guarded against repetition. Respondents put forward no unmaintainable contention that the article was not calculated to influence jury and judge, to prevent a fair and impartial trial, and so to obstruct the administration of justice. They make no impossible claim that newspaper publishers are peculiarly privileged to thus introduce improper matter to jury and judge—are not subject to the liabilities imposed by law upon any person who orally or in writing does the like. But they contend that since the power of United States Courts to proceed in contempt is limited by Sec. 268, Judicial Code, to "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice," the power is lacking here in that



the publication was not "so near" the court within the meaning of the statute. In argument, they refer to *Morse v. Ore Purchasing Co.*, 105 Fed. 337, as indicating support for their contention in that therein the defeated party secured a new trial because of a series of prejudicial publications (presumably by this newspaper) during the trial, but that "it never occurred" to eminent counsel that contempt would lie. Referred to incidentally by them, so is it here. It is clear this publication did obstruct the administration of justice, and obviously because it was "so near" to the court, and that within the meaning of the statute.

"So near" in the statute means not so far off, not so distant but what it may obstruct the administration of justice. It is not a question of linear measurement, but of probable effect. Not where the press runs, but where the publication circulates. So long as jury and judge are engaged in a trial, it is of no moment that the improper influence extended over them was miles away from the court room rather than adjoining it. The effect is the same, the consequences the same, the evil as great, and it is the effect, consequences, evil, the law guards against.

The thoughtful mind needs but momentary reflection to subscribe hereto. In *Kirk vs. U. S.* 192 Fed. 275, the appeals court of this circuit held oral attempts to influence jurors, made over half a mile from the courtroom, were contempts within the statute, saying "it is obvious that any willful

attempt improperly to influence jurors \* \* \* no matter where committed, is sufficiently near to the presence of the court to tend to obstruct the administration of justice," and that without the power to summarily deal with such attempts, "the courts would be practically helpless."

McCaully vs. U. S. 25 App. D. C. 404 is a like case, and after conviction for contempt the Supreme Court (198 U. S. 582-586) refused *habeas corpus* and *certiorari*. It hardly needs suggestion that this being true in respect to oral words, *a fortiori* must it be true in respect to written words, of more permanency and potency.

In U. S. vs. Newspaper Co., 220 Fed. 458, it was held that newspaper publications in the city of a trial, tending to embarrass the court in consideration of the case or to excite prejudice against a party, or against the court contingent on the nature of its ultimate decision, are so near the court as to obstruct the administration of justice within the meaning of the statute.

In re Josephus Daniels, 131 Fed., 95, seems *contra*, but therein the publication was after the proceeding criticised was finished and so proper subject of criticism.

Respondents further contend that the publication, being without "willful intent" to obstruct justice is not contemptuous. But they or those for whom they must respond, whose acts are their acts, knew the trial was on and intended to and voluntarily did publish the article, and that is all the

willful intent necessary in any case.

“If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under the circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent.”

Ellis vs. U. S. 206 U. S. 257.

Doubtless nothing was intended but a “good story” for general circulation, but they knew the circumstances, that the trail was on, that the article would probably be read by jury and judge, and they knew the probable consequences,—obstruction of the administration of justice and—an accounting by the responsible publishers.

In the like case of *Newspaper Co. vs. Com.* (Mass.) 74 N. E., 682, it is accordingly held that intent to publish is alone material, though lack of intent to thereby obstruct justice may be considered in mitigation of punishment. If the article was true and not only believed true, it is neither defense nor mitigation.

“A publication likely to reach the eyes of a jury \* \* \* would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a

case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with reference to a court. \* \* \* \* \*

When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied."

Patterson's Case, 205 U. S. 462.

Here, in brief compass, is the law, its reasons and limitations. At argument, that the court had not admonished the jury not to read accounts of the trial was mentioned. It may be answered, the article was more than an account of the trial, that no one including courts are bound to anticipate and guard against another's negligence to say nothing of violation of law, that therein is no defense, and that such publications are contempts even if not read by jury or judge, because of the probability that they will be, or may be despite admonition, because of their evil tendencies and possibilities.

See Newspaper Co. vs. Com. (Mass.) 52 N. E. 445.

Respondents' last contention is that if they be in contempt, since they did not intend contempt they should be adjudged only to pay costs of this proceeding, citing Savings Bank V. Clay Center,



219 U. S. 527, and other cases. If this were strictly a criminal contempt or one involving the court alone, their contention might be conceded. But here, the proceeding has a double aspect. Criminal, in that it interfered with discharge of the court's duty and obstructed justice; civil, in that the publication proximately caused the trial's failure and inflicted pecuniary damage on plaintiff therein to the extent of costs uselessly paid, \$617.95. In respect to criminal contempts the penalty is usually punitive, fine or imprisonment. In respect to civil contempts the penalty is usually remedial, a fine which may be measured in some degree by the injured party's pecuniary damage and for his use. See *Gompers Case*. 221 U. S. 441, 445.

The plaintiff in the interrupted case, the United States, is the complainant here. Any fine imposed is necessarily for its use. It appears but just that taking into consideration both the civil and the criminal aspects of this proceeding, a fine should be imposed, in amount measured by the pecuniary loss suffered by the United States from respondents' act, wherein is no punishment save that in any case when one at fault makes whole the one he injures. It is a basic principle of morals and law that he who inflicts damage upon another shall indemnify him. Accordingly, respondents are adjudged in contempt and to pay a fine in the amount of \$617.95, and costs.

BOURQUIN, J.

Dec. 11, 1915.

And thereafter on the 15th of December, 1915, a judgment was duly entered.

(TITLE OF COURT AND CAUSE.)

**JUDGMENT.**

This matter coming on regularly to be heard in open court on the 6th day of December, A. D. 1915, B. K. Wheeler, United States Attorney for the district of Montana, and Homer G. Murphy, Assistant United States Attorney for the District of Montana, appearing on behalf of the United States, and Messrs. Walsh, Nolan & Scallon, and Messrs. Day & Mapes, appearing as counsel on behalf of the respondents, said matter was argued by counsel for the respective parties, and thereupon submitted to the court for its decision; and thereafter, on the 11th day of December, A. D. 1915, the court, after fully considering said matter, rendered its decision herein, which is hereby made a part hereof, wherein and whereby the court found that the accusation in the information is true and that the respondents, The Independent Publishing Company, a corporation, and Will A. Campbell, its Manager and Editor, did commit a contempt of this court, and ordered and adjudged that for such contempt the said respondents, The Independent Publishing Company, a corporation, and the said Will A. Campbell, should be fined in the sum of Six hundred and seventeen and 95-100 dollars, together with the costs of this proceeding.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the court that the said Independent Publishing Company, a corporation, and Will A. Campbell, did commit a contempt of this court as alleged in the information herein, for which contempt it is ordered and adjudged they pay a fine of Six hundred and seventeen and 95-100 dollars, and costs taxed at Nineteen 15-100 Dollars.

Judgment rendered and entered this 15th day of December, A. D. 1915.

GEO. W. SPROULE, Clerk.

The foregoing bill of exceptions contains all of the evidence upon which the judgment and decision above set forth is based.

\* \* \*

THIS IS TO CERTIFY, That the foregoing bill of exceptions is allowed, and this is to further certify that it contains all of the facts and evidence upon which the judgment adjudging in contempt is based, is a true bill of exceptions and is hereby ordered filed.

DATED this 29th day of December, 1915.

GEO. M. BOURQUIN,

Judge.

THIS IS TO ACKNOWLEDGE service of the foregoing bill of exceptions and to acknowledge receipt of copy of same this 21st day of December, 1915.

B. K. WHEELER,

District Attorney.

(Endorsed) No. 481. Title of Court and Cause. Bill of Exceptions. Filed December 29, 1915. Geo. W. Sproule, Clerk, by Harry H. Walker, Deputy Clerk.

And thereafter, to-wit, on the 29th day of December, 1915, an Assignment of Errors and Petition for Writ of Error was filed herein, and order made and filed granting a Writ of Error herein, all being in words and figures as follows, to-wit:

*In the District Court of the United States, District of Montana.*

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In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING COMPANY,  
a corporation, and Its Manager and Editor,  
WILL A. CAMPBELL.

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**ASSIGNMENT OF ERRORS.**

Come now the Respondents, Independent Publishing Company, a corporation, and Will A. Campbell, above named, and each of them, by their respective Attorneys, and make and file the following assignment of errors upon which they, and each of them, will rely as follows, towit:

1. The said Court erred in not setting aside the citation issued herein, and in not dismissing the proceedings thereunder.

2. The said Court erred in rendering judgment against the above named Respondents, or either of them, in said cause upon the pleadings in said



cause, and in adjudging said Respondents in contempt of Court, and that they pay a fine of \$617.95 and that said judgment is contrary to law and the facts, as stated in the pleadings in said cause.

E. C. DAY,

C. B. NOLAN,

Attorneys for Respondents and Plaintiffs in  
Error.

*In the District Court of the United States, District  
of Montana*

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In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING COMPANY,  
a corporation, and Its Manager and Editor,  
WILL A. CAMPBELL,

---

**PETITION FOR WRIT OF ERROR.**

Come now the Independent Publishing Company, a Corporation, and Will A. Campbell, its Manager and Editor, the Respondents above named, and each of them, by their respective attorneys, and complain that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause in said United States District Court, for the District of Montana, wherein Respondents were adjudged in contempt of Court and were further adjudged to pay a fine in the sum of \$617.95 and costs, manifest error hath happened to the great damage of said Respondents, and each of them, respectively.

Wherefore, said Respondents, and each of them,

pray for the allowance of a writ of Error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also an order to be made fixing the amount of security which the Respondents shall give and furnish upon said Writ of Error, that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners will ever pray.

E. C. DAY,

C. B. NOLAN,

Attorneys for Respondents.

*In the District Court of the United States, District  
of Montana*

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In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING COMPANY,  
a corporation, and Its Manager and Editor,  
WILL A. CAMPBELL,

---

**ORDER ALLOWING WRIT OF ERROR.**

Upon motion of C. B. Nolan, Esq., one of the Attorneys for the above named Respondents, and upon filing a petition for a Writ of Error and an Assignment of Errors, it ORDERED that a Writ of Error be, and the same is hereby, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment

heretofore entered herein, and that the amount of Bond on said Writ of Error be, and the same is hereby fixed at \$1000.00, and that upon due execution and approval of said Bond, the same shall act as a supersedeas herein.

GEO. M. BOURQUIN,

Judge.

And on said 29th day of December, 1915, a bond on Writ of Error was filed herein, being as follows. to-wit:

*In the District Court of the United States, District  
of Montana*

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In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING COMPANY,  
a corporation, and Its Manager and Editor,  
WILL A. CAMPBELL,

---

**BOND.**

KNOW ALL MEN BY THESE PRESENTS,  
That We, Independent Publishing Company, a corporation, and Will A. Campbell, as principals, and Massachusetts Bonding and Insurance Company, as surety, are held and firmly bound unto the United States of America, in the sum of \$1000.00, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, successors, representatives and assigns, firmly by these presents.

Sealed with our seals, and dated this 28th day

of December, 1915.

Whereas, the above named Respondents have sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above entitled cause, adjudging said respondents in contempt of Court, and that they pay a fine of \$617.95, which said judgment was signed and passed by the District Court of the United States, for the District of Montana, on the 11th day of December, 1915;

Now, Therefore, the condition of the above obligation is such that if the said Respondents, Independent Publishing Company, a corporation, and Will A. Campbell, shall prosecute said Writ to effect, and answer all costs and damages, if they, or either them, shall fail to make good their plea, then this obligation shall be void, otherwise to be in full force and virtue.

INDEPENDENT PUBLISHING CO.

By J. M. MacMillan,  
(Independent Publishing                      Treasurer.  
Company Seal)

Will A. Campbell. (Seal)  
MASSACHUSETTS BONDING &  
INSURANCE CO.

By Sol Poznanski,  
Agent.

ATTEST:

C. B. NOLAN,

Attorney in Fact.

(Massachusetts Bonding &  
Insurance Co. Seal)

*Approved: Bourquin, J.*



And on said 29th day of December, 1915, a Writ of Error was duly issued herein and served and filed Dec. 30, 1915, being as follows, to-wit:

*In the District Court of the United States, District  
of Montana*

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In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING COMPANY,  
a corporation, and Its Manager and Editor,  
WILL A. CAMPBELL,

---

**WRIT OF ERROR. (ORIGINAL.)**

*United States of America, ss.*

The President of the United States of America to the Honorable, the Judge of the District Court of the United States, for the District of Montana, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of the plea, which is in the said District Court of the United States, for the District of Montana, before you entitled In the Matter of the Contempt of the Independent Publishing Company, a corporation, and Its Manager and Editor, Will A. Campbell, a manifest error hath happened to the said Independent Publishing Company, a corporation, and Its Manager and Editor, Will A. Campbell, Respondents in said proceedings, to the great damage of the said Independent Publishing Company, a corporation, and its Manager and Editor, Will A. Campbell, Plain-

tiffs in Error, as by their complaint appears;

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so that you may have the same at the said place in said Circuit within thirty days from the date of this Writ, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

WITNESS, The Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 29th dy of December in the year of our Lord One Thousand Nine Hundred and Fifteen, and of the Independence of the United States the One Hundred and 40th.

GEO. W. SPROULE,  
Clerk of the District Court of  
the United States for the  
District of Montana.

By HARRY H. WALKER,  
Deputy Clerk.

Due personal service of within Writ of Error made and admitted and receipt of copy acknowledged this 29th day of December 1915.

B. K. WHEELER,  
U. S. District Attorney  
for Montana.

**ANSWER OF COURT TO WRIT OF ERROR.**

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of the United States, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

GEO. W. SPROULE,  
Clerk.

(SEAL.)

And on said 29th day of December, 1915, a Citation was duly issued, thereafter served and filed Dec. 30, 1915, being as follows, to-wit:

*In the District Court of the United States, District  
of Montana*

---

In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING COMPANY,  
a corporation, and Its Manager and Editor,  
WILL A. CAMPBELL,

---

**CITATION. (ORIGINAL.)**

*United States of America, ss.*

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States, for the District of Montana, wherein the Independent Publishing Company, a corporation, and its Manager and Editor, Will A. Campbell, are plaintiffs in Error and the United States of America is Defendant in Error, to show cause, if any there be, why judgment in the said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. M. Bourquin, Judge of the District Court of the United States, for the District of Montana, and the Seal of said



District Court, this 29th day of December, 1915.

GEO. M. BOURQUIN,

United States District Judge  
for the District of Mon-  
tana.

Attest:

GEO. W. SPROULE,

Clerk.

By HARRY H. WALKER,

Deputy Clerk.

(SEAL.)

Personal Service of the foregoing Citation ad-  
mitted this 29th day of December, 1915.

B. K. WHEELER,

United States District Attorney.

**CERTIFICATE OF CLERK U. S. DISTRICT COURT TO  
TRANSCRIPT OF RECORD.**

UNITED STATES OF AMERICA,  
DISTRICT OF MONTANA—SS.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 34..... pages, numbered consecutively from 1 to 34..... inclusive, is a full, true and correct transcript of the pleadings and judgment, the bill of exceptions, assignment of errors and other proceedings had in said cause and of the whole thereof, as appears from the original files and records of said court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of thirteen<sup>80</sup>/<sub>100</sub> Dollars (\$13<sup>80</sup>.....), and have been paid by the plaintiffs in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 19th..... day of January  
A. D. 1916.

Geo W Sproule  
Clerk.

Seal



IN THE  
United States Circuit Court of Appeals  
FOR THE  
NINTH CIRCUIT.

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In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING  
COMPANY, a corporation, and Its  
Manager and Editor, WILL A.  
CAMPBELL,  
*Plaintiffs in Error  
and Respondents.*

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BRIEF OF PLAINTIFFS IN ERROR.

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E. C. DAY,  
WALSH, NOLAN & SCALLON,  
Attorneys for Plaintiffs in Error.

Filed

JUN 7 - 1916

F. D. Monckton,  
Clerk.





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BRIEF OF PLAINTIFFS IN ERROR.

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On the 29th of November, 1915, the United States District Attorney for the District of Montana filed in the United States District Court at Helena, Montana, an information against the Independent Publishing Company, a corporation, and Will A. Campbell, its Manager, charging contempt. (Tr. p. 2).

The Independent Publishing Company published

a daily paper at Helena, Montana, known as "The Helena Independent", and in its issue of 27th of November, 1915, it contained a news article regarding one Mr. Poe, who was on trial then in the United States District Court on a felony charge. The article appears at pages 4, 5, 6 and 7 of the transcript. Pursuant to a citation, which was issued, directing the respondents to show cause, they filed an answer. (Tr. pp. 11 and 12).

In this answer it is admitted that the article was published, and that it was not based on facts adduced at the trial. It is alleged that Mr. Campbell, as editor and manager, exercised reasonable care in excluding from the paper anything that would tend to interfere with the due administration of justice, and it is alleged that he exercised reasonable care and diligence in the employment of competent and careful reporters. It is then stated that Mr. Campbell left the office of the company at the usual hour, leaving a competent person in charge; that the article in question was written by W. H. Perkins, one of the reporters on the paper, and that the article before being published was not submitted for editorial supervision, as should have been done; that Mr. Perkins received the data for the article from a reliable source, and that he wrote and published the article in good faith, without intending to interfere with the administration of justice; that Mr. Campbell or no officer of the corporation knew of the article or its contents until after its publication, and regret was expressed for its publication, with

an assurance that in the future such care would be exercised as would render impossible recurrence of such an event. How the article came to be written and the source of the information, and how it came to be published without supervision is shown by the affidavit of Mr. Perkins, the writer. (Tr. pp. 14 and 15).

On the averments of the information and answer the case was submitted for determination. The respondents were adjudged in contempt and a fine of six hundred seventeen and 95-100 dollars (\$617.95), exclusive of costs, was imposed.

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## SPECIFICATION OF ERRORS.

### I.

The court erred in finding that the publication of the article under consideration constituted contempt.

### II.

The court erred in adjudging Mr. Campbell, the editor and manager, in contempt.

### III.

The court erred in considering the costs incurred in the criminal case, and including same in the judgment which was rendered.

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## ARGUMENT.

The District Courts of the United States were created under the authority given Congress by that part of Section 1, Article 3 of the Constitution, which provides that:

“The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish.”

And also by that part of Section 8, Article 1, which provides that Congress shall have power “to constitute tribunals inferior to the Supreme Court”.

By the Act of March 2, 1831, which was retained without substantial change in the act of March 3, 1911, known as the Judicial Code and being section 268 thereof, it is provided:

“The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; *provided* that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the said courts.”

At the time of its passage, and for many years thereafter, the purpose and effect of the Act of 1831 were understood and accepted by judges who were familiar with the controversies that occasioned its enactment and its plain provisions were enforced. Recently, a tendency has been exhibited by some judges to construe away what seems to be the very clear and explicit language of the Act and to construe as contempt conduct necessarily not so according to its express provisions.

Prior to the impeachment of Judge Peck, whose acquittal was followed by the Act of 1831, the question of the power of courts to punish summarily as contempts newspaper publications does not appear to have been agitated except in the state of Pennsylvania. Two reported cases (*Respublica vs. Oswald*, 1 Dallas, 318, in the Supreme Court of Pennsylvania, and *Hollingsworth vs. Duane*, 6615 Federal cases in the United States Circuit Court for Pennsylvania), promulgated the doctrine that the courts in the United States had a common law power to punish in such cases, and held that the constitutional guarantee of trial by jury had no application. The judges in the cases referred to erroneously supposed that by the common law, courts of record in England possessed this power, whereas in truth, it had never been so held, except as to the courts constituting the *Aula Regis*, and in respect to them, on the theory that the sovereign personally dispensed justice.

Reg. v. LeFroy, L. R. 8 Q. B. 134.

Oswald on Contempt, 3rd ed., page 3, citing  
3 Holdsworth, History of English Law, 312,  
says:

“In early times, contempt, even in the face of  
the court was proceeded against by indictment  
or other ordinary process, but not summarily.”

Referring to the ancient dictum of Wilmot J. in  
Sparks v. Martyn, (1669), 1 Vent. 1, that

“It is a necessary incident to every court of  
justice, whether of record or not, to fine and  
imprison for a contempt of the court, acted in  
the face of it”,

Oswald says, at page 134:

This appears in fact not to have been the  
case, and the judgment in question will be  
found on examination to depend rather on a  
somewhat turbid rhetoric than on ratiocination  
or the examination of authorities.”

However, the point that the power to punish sum-  
marily contempts out of court was at common law  
confined to the courts of the sovereign on the theory  
of his personal participation in their session was  
definitely settled in *Reg v. LeFroy*, L. R. 8 Q. B.  
134 (1872). In that case, an attorney in a pending  
case before a county court, which was a court of  
record, published in a newspaper respecting a ruling  
of a judge, the following language:

“The statement was a monstrosity, and, as  
I can now say without fear of an arbitrary or  
tyrannical abuse of power, an untruth.”

In separate judgments by Chief Justice Cockburn and Judges Mellor and Qain, upon a consideration of the old authorities, it was shown that contempts out of court were punishable in the Superior Courts at Westminster, including the courts of Queens Bench, Common Pleas and Exchequer, on the theory that such courts are divisions of the Aula Regis, "where it is said the King in person dispensed justice, and their power of committing for contempt was an emanation of the royal authority for any contempt of the court would be a contempt of the sovereign."

But it was held that other courts of record created by Parliament and not supposed to be coeval with the foundation of the State itself, had never attempted to exercise any such authority.

In *Respublica v. Oswald*, 1 Dallas, 318, decided by the Supreme Court of Pennsylvania July 17, 1788, it appears that one Eleazer Oswald, a publisher at the city of Philadelphia of the Independent Gazateer, printed articles against the character of Andrew Brown, the master of a female academy in the city of Philadelphia, on account of which Brown brought an action for libel against Oswald in the Supreme Court of Philadelphia, and pending the action Oswald published articles in his newspaper, which, it was supposed, had a tendency to prejudice the public with respect to the merits of the cause. He was cited for contempt on a writ issued by Chief Justice McKean, who had been one of the signers of the Declaration of Independence, and was Governor



of Pennsylvania from 1799 until 1808. Mr. Lewis, appearing for the state, insisted that Oswald's address to the public manifestly tended to interrupt the course of justice; that it was an attempt to prejudice the minds of the people in a cause then pending, and by that means, to defeat the plaintiff's claim to justice, and to stigmatize the judges whose duty it was to administer the law.

Mr. Sargent, for the respondent, insisted that the court had no power to punish the defendant summarily; that he was entitled under the Ninth Section of the Bill of Rights of the State of Pennsylvania to a trial by jury. He said "Those contempts which are committed in the face of a court stand upon a very different ground. Even the court of *Admiralty*, (which is not a court of record) possesses a power to punish them; and the reason arises from the necessity that every jurisdiction should be competent to protect itself from immediate violence and interruption. But contempts which are alleged to have been committed out of doors, are not within this reason; they come properly within the class of *criminal offenses*; and as such, by the 9th Sect. of the Bill of Rights, they can only be tried by a jury."

The court, however, held that:

"It is a contempt punishable by attachment to publish remarks in a newspaper, which have a tendency to prejudice the public with respect to the merits of a cause depending in court."

and fined the respondent ten pounds and imprisoned him for one month.

After Oswald had paid his fine and served his term, he presented a memorial to the General Assembly of the State, giving a history of the proceedings against him, and complaining of the decision of the judges and of his imprisonment, and calling upon the United States to determine "whether the judges did not infringe the Constitution in direct terms in the sentence they had pronounced, and whether, of course, they had not made themselves proper objects of impeachment."

The Assembly appointed a committee on the order of procedure, and resolved itself into a committee of the whole, where it heard evidence on the memorial. After this Lewis, who had been counsel for the state in the court proceeding and was then a member of the House, in an elaborate argument, undertook the vindication of the judges. Mr. Findley, a member from Wesmoreland, followed Mr. Lewis, and commenting upon the judgment of the court, said:

"That it was a mistaken judgment, every man, he alleged, who possessed a competent share of common sense and understood the rules of grammar, was able to determine on a bare perusal of the bill of rights and constitution. With these aids, he defied all the sophistry of the schools and the jargon of the law to pervert or corrupt the explicit language of the text, and, therefore, he regretted that, in listening to the ingenuity of Mr. Lewis' paraphrase, his admiration was not necessarily followed by conviction".

Then after having discussed the 9th Section of the Bill of Rights, he said:

“For outrages committed in the face of the court, for the misconduct of its officers, and for a disobedience or resistance of its process, there seemed, he said, to be a propriety in establishing an immediate remedy. But this did not extend, in his opinion, to the case of constructive contempts; to criminal offenses perpetrated out of the view of the court; nor to such acts as in their nature did not call for a sudden punishment, and which, in their operation, involved a variety of facts that a jury was only competent to investigate and determine.”

The judges escaped impeachment by a vote of fifty-seven to twenty-three, and in 1797, Judge McKean who held extreme views on the subject generally, bound over Cobbett, who was then publisher of a paper in Philadelphia on a charge of seditious libel against the King of Spain, but the grand jury returned no bill.

The attempt of Oswald to have the judges impeached failed, but the controversy continued. McKean was thrice elected Governor of the State, and by his strong influence defeated many attempts to limit the authority of the courts to punish contempts by summary process.

In 1804, one Thomas Passmore was attached and fined for contempt by Chief Justice Shippen for the publication in a tavern in Philadelphia of a statement that a party to a case pending before the court had committed perjury.

*Respublica v. Passmore*, 3 Yeates, 441.

Passmore complained to the Legislature against the Chief Justice and two associate justices, which resulted in an impeachment by the House of Representatives and a trial by the Senate. In January, 1805, the Senate voted thirteen guilty and eleven not guilty, the proceedings failing for lack of the required two-thirds majority.

The struggle, for freedom to publish comments on judicial proceedings, without being subjected to summary penalties was continued in Pennsylvania after the institution of the Federal Courts; the judges taking the position that the ruling in *Respublica* established their authority.

In *Hollingsworth v. Duane*, Federal Cases 6615 (May 18, 1801), Hollingsworth brought an action for libel against Duane, the publisher of the *Aurora*, a newspaper in Philadelphia. The declaration stated plaintiff to be a citizen of the United States, and defendant an alien. Defendant by plea in abatement claimed that the court had no jurisdiction, because he was a citizen of Pennsylvania. This point was tried by jury, and the jury found defendant to be an alien. While the case was still pending defendant in the issue of his newspaper of May 20, 1801, published an article attacking the court.

In *Hollingsworth vs. Duane*, Federal Cases 6615, an attachment was issued against Duane. Lewis, who had been counsel in *Res Publica*, cited English cases as precedents for the power to attach sum-



marily for cases in contempt. Among others he referred to the case of Rakes, an attorney, who was held in contempt for printing his brief before the case came on to be tried, in which Lord Hardwicke said:

“The offense did not consist in the printing, for a man may give a printed as well as a written brief to counsel, but the contempt to this court was, prejudicing the world with respect to the merits of the case before it was heard.”

Lewis in argument also referred to Oswald's case, and the acquittal of Judge McKean by the Legislature in 1798. Dickerson for defendant, contending that the power to punish summarily for contempts out of court without a jury must be looked upon as the exercise of a jurisdiction unfriendly to liberty, dangerous to the citizen, and easily capable of being perverted to the most odious purpose. He also contended, as had been contended in the Oswald case, that the exercise of such power was in violation of the Constitution of the United States. Judge Griffith referring to the English cases said that for contempts of inferior jurisdiction not of record, unless same are in the face of the court, there is no other method than by indictment, but *Respublica vs. Oswald* was held to be the law, and defendant was punished for contempt.

The same point was affirmed in *United States vs. Duane*, Federal Cases, 14997 (May 22, 1801), where in passing judgment on Duane, Chief Justice Tilghman held that the Constitution of the United States

did not guarantee trial by jury in contempt cases, saying:

“It was determined very solemnly in the Supreme Court of Pennsylvania in the case of *Commonwealth v. Oswald*,. The present Governor of Pennsylvania was then Chief Justice. He is well versed in the general principles of law, as well as the usages and customs of the United States, and cannot be supposed to have favored construction unfriendly to true liberty, or unwarranted by the genuine sense of the Constitution. The principles established in the *Oswald* case are too strongly founded to be shaken, and I can say with certainty that for the last seven years they have been considered and acted upon as the law of Pennsylvania. The statutes of the United States expressly give to their courts the power of punishing contempts by fine or imprisonment at their discretion, and whoever attends to the expressions of those statutes will easily perceive that they recognize a summary mode of proceeding.”

In 1809 after the death of Governor McKean, the Pennsylvania Legislature, in pursuance of a strong public demand, enacted a statute relating to summary punishments for contempt, which is still in force, and which provides:

“The power of the several courts of this commonwealth to issue attachments and to inflict summary punishment for contempts of court shall be restricted to the following cases, to-wit:

1. To the official misconduct of the officers of such courts respectively;

2. To disobedience or neglect by officers, parties, jurors or witnesses, of or to the lawful process of the court;

3. To the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.”

In addition to the foregoing, it was specifically provided that publications out of court shall not be made the basis of summary attachment and punishment.

The history of the controversy in Pennsylvania is found in the note to *Respublica vs. Oswald*, in 1 Dallas, 318, *Respublica v. Passmore*, 3 Yeates, 438, and “Constructive Contempt” by John M. Thomas, ex-judge of the Supreme Court of Missouri.

We refer at this length to the Pennsylvania cases, for it was in this state that the Act of 1831, under which this proceeding was instituted, was first considered and construed. Mr. Justice Baldwin to whose decisions reference will subsequently be made, was thoroughly conversant with the proceedings here referred to, and had distinctly in mind the evils which the changed legislation of 1831 was intended and designed to remove.

## HISTORY OF THE ACT OF 1831.

After the enactment of the Pennsylvania statute and similar statutes in other states, the question remained at rest in so far as the United States Courts were concerned for more than twenty years. The specific occasion for the enactment of the Federal

statute was the acquittal, upon impeachment proceedings, of Judge Peck, a judge of the United States District Court of Missouri, who in the year 1825, issued an attachment in contempt against Lawless, an attorney, imprisoned and disbarred him for a period of eighteen months for printing a criticism upon the reasoning of the judge in a published opinion. Judge Peck was impeached by the House of Representatives by a vote of one hundred and twenty-three to forty-nine; was tried by the Senate and acquitted on January 31, 1831, by the narrow margin of twenty-two to twenty-one.

James Buchanan, afterwards President of the United States, who was one of the prosecutors on behalf of the United States, said in part in his speech:

“I will venture to predict that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim.”

The day after Judge Peck's acquittal, Draper, a representative from Virginia, which state had long had a statute similar to the Pennsylvania statute, introduced in the House, this resolution:

“RESOLVED That the Committee on the Judiciary be directed to inquire into the expediency of defining by statute all offences which may be punished as contempts of the courts by the United States.”

On February 10, 1831, Buchanan, who was a



member of the House from Pennsylvania and familiar with the Oswald case and the statute of Pennsylvania, which had then been in force for twenty-two years, reported a bill from the Judiciary Committee, which, after amendment, was enacted March 2, 1831. In its original form with title it read as follows: (4 Statutes 487):

“An act declaratory of the law concerning contempt of Court.

“BE IT ENACTED etc. That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said court in their official transactions and the disobedience or resistance by any officer of the said courts in their official transactions and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule, decree or command of the said courts.”

The judgment in Oswald's case was not only vigorously attacked as unconstitutional at the time, but was made the basis of the impeachment proceedings against Judge McKean. It was never acquiesced in in Pennsylvania, and although followed as law in the Duane cases, was repudiated as the law of Pennsylvania by the enactment of the statute of 1809.

The Peck case involved the attempt by a United States District Judge to punish summarily as contempt a publication referring to a case which had terminated, but it does not follow that Congress in enacting the Act of March 2, 1831, intended to confine the limitations of the statute to such cases. If that had been the intention, it could have been very easily expressed. It is rather to be presumed that Congress had in mind the controversy which had raged in Pennsylvania. Buchanan, who was a member of the House from that state and a member of the Committee on the Judiciary, undoubtedly, was familiar with the struggle against the arbitrary power of the judges which had ended with the enactment of the Pennsylvania statute in 1809. As one of the prosecutors of Peck before the Senate, he contended that:

“Our courts have no right to punish as for contempts, in a summary mode, libels, even in pending cases.”

(Gales and Seaton’s Register of the Debates 1831, page 42).

Mr. McDuffie of South Carolina, one of the prosecutors on behalf of the House in his speech of December 20, 1831, said:

“The correct principle then was this: The courts of the United States had no power to punish for contempt further than their own self preservation required. It was necessary that they should possess the power to protect themselves in the administration of justice; to

prevent and punish direct outrages on the court; to prevent the judge from being driven from the bench, the jury from being assaulted, and the regular and fair administration of justice from being impeded.

\* \* \*

“It must be aflagrant outrage in the face of the court to justify a summary punishment for contempt.”

He also criticised most vigorously the attempt to import into the United States the theory of the court of England that they could punish for contempt summarily, upon the ground that “they were administering the King’s justice were an emanation of his power, and that the same principle that protected the character and person of the King as sacred protected those of his judges in like manner.”

### CASES UNDER THE ACT OF 1831.

That the meaning of the law, which, in fact, upon its face presents no ambiguity, was clearly understood at the time of its enactment is shown by the first decision under it.

In *Ex Parte Poulson*, Federal Cases 11350 (Circuit Court for the Eastern District of Pa. 1835), decided by Mr. Justice Baldwin of the Supreme Court of the United States, a rule was directed to the editor of the *American Daily Advertiser*, to show cause in contempt for publishing an article concerning the plaintiff in a suit then pending, in which

plaintiff was described as a counterfeiter, and plaintiff's witnesses attacked. After condemning in the severest language, the publication as being calculated to produce the worst effect upon the administration of justice, Mr. Justice Baldwin said:

“The first inquiry is into the jurisdiction of this court to issue an attachment for contempt for a publication relating to a suit on trial or in any way pending before it.”

After quoting the Act of 1831, he says:

“The history of this Act, the time of its passage, its title and provisions must be considered together in order to ascertain its meaning and true construction. It was enacted shortly after the acquittal of Judge Peck of Missouri on an impeachment preferred against him for issuing an attachment against a member of the bar for making a publication in relation to a suit which had been decided by that judge. On the trial, the law of contempt was elaborately examined by the learned managers of the House of Representatives and the counsel for the Judge. It was not controverted that all courts had power to attach any person who should make a publication concerning a cause during its pendency, and all admitted its illegality when done while the cause was actually on trial. It had too often been exercised to entertain the slightest doubt that the courts had power both by the common law and the express terms of the Judiciary Act Section 17 (1 Stat. 83), as declared by the Supreme Court to protect their suitors by the process of attachment. With this distinct knowledge and recognition



of the existing law, it cannot be doubted that the whole subject was within the view of the Legislature; nor that they acted most advisedly on the law of contempt, intending to define in what cases the summary power of the courts should be exercised, and to confine it to the specified cases.

\* \* \*

“It would ill become any court of the United States to make a struggle to retain any summary power, the exercise of which is manifestly contrary to the declared will of the legislative power. It is not like a case where the right of property or personal liberty is intended to be affected by a law which the court would construe very strictly to save a right granted or secured by any former law; neither is it proper to arraign the wisdom or justice of a law to which a court is bound to submit; nor to make an effort to move in relation to a matter when there is an insuperable bar to any efficient action.

“The law prohibits the issuing of an attachment except in certain cases, of which the present is not one. It would, therefore, be not only utterly useless, but place the court in a position beneath contempt, to grant a rule to show cause why an attachment should not issue, when an exhibition of the Act of 1831 would show most conclusive cause. The court is disarmed in relation to the press. It can neither protect itself, nor its suitors. Libels may be published upon either without stint. The merits of a cause depending for trial or judgment

may be discussed at pleasure. Anything may be said to jurors through the press, the most wilful misrepresentations made of judicial proceedings, and any improper mode of influencing the decisions of causes by out of door influence practiced with impunity.

“With this limitation on the summary jurisdiction of the court and the want of any legal provision making it cognizable by indictment, we cannot say that the publication which is the ground of this motion, or any other is or can be any disturbance of the business of the court. The action of the press is noiseless, producing the same effects, far or near, it matters not. The business of the court is not interrupted. Judges and jurors can perform their functions on the bench and in the box by confining their attention to the law and evidence.”

In

United States v. Holmes, Federal Cases 15853, decided by Mr. Justice Baldwin in 1842, the court on account of the sensational character of the testimony, announced that newspaper reporters would not be permitted to come within the bar of the court, except on condition of suspending publications until the trial was concluded. Mr. Justice Baldwin gave as a reason for issuing such order that:

“By an act of Congress passed some years since, the court has no longer the power to punish as for contempt the publication of testimony pending a trial before us.”

Ex parte Bradley, 7 Wall. 364, (1868)

presents the following case:

Bradley was guilty of misbehavior before Mr. Justice Fisher, who was a Justice of the Supreme Court of the District of Columbia while holding a session of the criminal court of the District, and the Supreme Court of the District punished him by disbarment on account of his offensive conduct and language towards one of its members. The Supreme Court of the United States held that the criminal court was a separate court, and that the Supreme Court was without jurisdiction. Mr. Justice Nelson in delivering the opinion granting a writ of mandamus to restore Bradley to his membership of the bar said:

“Under such circumstances and in this posture of the case, it is plain that no authority or power existed in the Supreme Court to punish for the contempt thus committed, even without reference to the Act of Congress of 1831, which in express terms restricts the power except for ‘misbehavior in the presence of said courts’ or so near thereto as to obstruct the administration of justice.”

In 1872 or 3 former Justice Curtis, of the Supreme Court of the United States in his lectures before the Harvard Law School, after stating that the Act of 1831 was passed in consequence of what occurred in connection with the impeachment proceedings against Judge Peck, quoted the Act and said:

“The common law authority of the courts as it has been exercised in England and in this

country and as it was exercised by Judge Peck in the case I spoke of extended much wider than this. It extended so far as to punish the editor of a newspaper for publishing an account of a trial while the trial was in progress, and there were many other cases to which this power to punish for contempt extended. It is now restricted either to the action of the court upon its own officers to prevent them from committing a breach of official duty or to contempts as they are called in the presence of the court, or *so near to the court as to disturb its proceedings* or to some misconduct of a juror or other person who disobeys an order of the court. If a juror, for instance, or a witness, disobeys the order of the court to attend, a process of attachment will issue against him under the provisions of this statute, but *with the exception of these cases the courts of the United States have no power to punish for contempt.* (Curtis on Jurisdiction of the United States Courts, 2nd ed. 176)."

In

Ex parte Robinson, 19 Wall 505 (1873),

the opinion was delivered by Mr. Justice Field, who said:

"The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and vested with jurisdic-



tion over any subject, they became possessed of this power, but the power has been limited and defined by the Act of Congress of March 2, 1831. The Act in terms applies to all courts, whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution may, perhaps, be a matter of doubt, but that it applies to the Circuit and District Courts, there can be no question. These courts were created by Act of Congress. Their powers and duties depend upon the Act calling them into existence or subsequent acts extending or limiting their jurisdiction. The Act of 1831 is, therefore, to them the law, specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases. First, where there has been misbehavior of a person in the presence of the courts or so near thereto as to obstruct the administration of justice; Second, where there has been misbehavior of any officer of the courts in his official transactions, and third, where there has been disobedience or resistance by any officer, party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised *to insure order and decorum in their presence* to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

In

McCaully's case, 25 App. D. C. 404,

there was involved the corrupt solicitation of a juror in a pending cause by an attorney. It was held that the fact that the solicitation occurred away from the court after the jury had been permitted to disperse, did not deprive the court of jurisdiction. The court said that the juror is a part of the court wherever he is, and it was accordingly held that interference with a juror personally came within the statute. This cause came before the Supreme Court on a petition for a writ of certiorari *In re McCaully*, 198 U. S. 582.

*In re Edawrd S. May*, 1 Fed. 737, (1880),

the judge, afterwards Mr. Justice Brown, punished for contempt a juror who corruptly negotiated with the defendant in a pending criminal case as to the verdict which should be rendered. The distinct ground of the judgment was that the juror disobeyed the order of the court. The court after quoting the Act of Congress, made the following statement:

“The Act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trial.”

In

*United States v. Anon*, 21 Fed. 761, (1884),

where District Judge Hammond held that a party to a case could be punished for threatening an Ex-

aminer at the taking of testimony. It was said at page 768:

“It is generally understood that the object of that statute which has been *substantially* enacted in Tennessee and other states was to enlarge the liberty of criticism by the press and others by curtailing the power to punish adverse comments upon the courts, their officers and proceedings as contempts, which tend to impair respect for the tribunal and thereby obstruct the administration of justice.”

In

Ex parte Schulenberg, 25 Fed. 211, (1885), petitioner, a citizen of Missouri, who came to Detroit to attend a trial in the federal court was served with a writ of garnishment from the state court, and thereupon applied to the federal court to set aside said process and restrain further proceedings. The first application was denied by Mr. Justice Matthews, and by Judge, afterwards Mr. Justice Brown. On the second application, Judge Brown delivering an opinion, stated:

“The difficulty in this case, however, arises from the statutes of the United States, one of which inhibits injunctions to stay proceedings in any court of a state except in bankruptcy cases, and the other of which limits our jurisdiction in cases of contempt to misbehaviors of any person in the presence of the court, or so near thereto as to obstruct the administration of justice, \* \* \*

“Conceding that the service of the writ of

garnishment was a contempt at common law, I doubt seriously whether it is misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice. Clearly it falls within no other clause of Section 725. These words seem to me to refer rather to riotous or unseemly conduct in the court room or in such immediate proximity thereto as to interrupt the sessions of the court or the orderly conduct of business therein and not to embrace constructive contempts of its authority.”

Savin, Petitioner, 131 U. S. 267,

and

Cuddy, Petitioner, 131 U. S. 280,

were both decided May 13, 1889, Mr. Justice Harlan delivering the unanimous opinion in each case.

Savin appealed from a judgment of the district court committing him to jail for contempt. The charge was that in the jury room of the court, being used for witnesses and also in the hallway he undertook to bribe witnesses not to testify against defendant in a pending criminal case. Mr. Justice Harlan after quoting in full the Act of March 2, 1831, held that although the offence stated was punishable by indictment that mode is not exclusive when a misbehavior is in the presence of the court or so near thereto as to obstruct the administration of justice. At page 276, he said: “The act of 1831, however, materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishments for contempt to certain specified



cases, among which was misbehavior in the presence of the court or misbehavior so near thereto as to obstruct the administration of justice. At page 276 he said:

“The act of 1831, however, materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishments for contempt to certain specified cases, among which was misbehavior in the presence of the court or misbehavior so near thereto as to obstruct the administration of justice. *Ex parte Robinson*, 19 Wall. 505-511. And although the word ‘summary’ was, for some reason, not repeated in the present revision, which invests the courts of the United States with power ‘to punish by fine or imprisonment at the discretion of the court, contempts of their authority’ in certain cases defined in section 725, we do not doubt that the power to proceed summarily for contempt in those cases, remains, as under the Act of 1831, with those courts. It was, in effect so adjudged in *Ex parte Terry* above cited. The question then arises whether the facts recited in the final order in the district court as constituting the contempt, which facts must be taken in this collateral proceeding to be true make a case of misbehavior in the presence of that court, or misbehavior so near thereto as to obstruct the administration of justice therein. There may be misbehavior in the presence of a court amounting to contempt that would not ordinarily be said to obstruct the administration of justice. So there may be misbehavior not in the immediate presence of the court, but outside of and in the vicinity of the

building in which the court is held, which on account of its disorderly character would actually interrupt the court being in session in the conduct of its business, and consequently obstruct the administration of justice.”

And adding at page 278:

“We are of opinion that the conduct of the appellant as described in the final order of the district court was misbehavior in its presence, for which he was subject to be punished without indictment by, fine or imprisonment, at its discretion, as provided in section 725 of the Revised Statutes. And this view renders it unnecessary to consider whether, as argued, the words ‘so near thereto as to obstruct the administration of justice’ refer only to cases of misbehavior outside of the court room or in the vicinity of the court building, causing such open or violent disturbance of the quiet and order of the court while in session as to actually interrupt the transaction of its business.”

In the Cuddy case, petitioner had been convicted in a contempt proceeding of approaching and attempting to influence a prospective juror whose name had been drawn and who had been sworn *voir dire*. An attempt was made to distinguish the case from the Savin case, on the ground that the record did not show that petitioner’s act occurred in the court room or while the court was in session. At page 284, Mr. Justice Harlan said:

“But both the petition for habeas corpus and the record of the district court are silent as to the particular locality where the appellant

approached McGavin, with a view of improperly influencing his actions in the event of his being sworn as a juror in the case of *United States v. Young*. That which, according to the finding and judgment the appellant did, if done in the presence of the court, that is, in the place set apart for the use of the court, its officers, jurors and witnesses, was clearly a contempt punishable as provided in section 725 of the Revised Statutes by fine or imprisonment at the discretion of the court and without indictment. *Ex parte Savin*, ante, p. 150|”

After holding that the district court is presumed to act within its jurisdiction, the court held that as the record did not show a case within the jurisdiction of the court “it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here.”

At page 286 it was said:

“We do not mean to say that this presumption as to jurisdictional facts about which the record is silent, may not be overcome by evidence. On the contrary, if the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under section 725 of the Revised Statutes made him liable to fine or imprisonment at the discretion of the court, he would have been entitled to the writ, and upon proving such facts to have been discharged. Such evidence would not have contradicted the record, but he made no such allegation in his application, and so far as the record shows, no such proof.”

In

Morse v. Montana Ore Pur. Co., 105 Fed.  
337 (1900)

District Judge Knowles granted a new trial on the ground that there was undue influence exerted over the jury by objectionable newspaper publication, editorials and articles, which, in the language of the charge were “well calculated to arouse prejudice against the plaintiff in this cause”, and were “written with a view to influencing in some way the determination of this cause.” It was claimed that the plaintiff ought “to have had the parties publishing these articles brought into court and punished for contempt or ought to have applied to the court for a continuance of the cause on account of the prejudice created by them, and by a failure so to do, waived the right to present the question upon a petition for a new trial.”

In overruling this objection, the judge said that “it was extremely doubtful as to the right of the plaintiff to ask that the publishers of this paper be brought into court and examined upon the charge of contempt.” He referred to the statement of Mr. Justice Nelson in *Ex parte Bradley*, 7 Wall. 364, that the statute “in express terms restricts the power, except for misbehavior in the presence of said courts, or so near thereto as to obstruct the administration of justice”, and the statement of Mr. Justice Field in *Ex parte Robinson*, 19 Wall. 505, that the power “can only be exercised to insure



order and decorum in their presence", and said (page 347):

"The Independent's publishers seemed to have been advised of the limited power of the court in this matter, for in the publication of that paper made immediately after Col. Sanders had called attention to its article, it refers to the fact that it had not brought its paper into court, or hawked it in the presence of the court."

In

Ex parte McLeod, 120 Fed. 130, (1903), which was an attachment in contempt for assaulting a United States Commissioner in the performance of his official duties, no penalty was inflicted, although the court expressed the opinion that one could be inflicted. In the course of the opinion District Judge Jones said (page 137):

"Congress intended by this statute to put an end to the power of any federal court to prevent by punishment, as for contempt criticism of judicial acts or decisions, or even mere libels on individuals concerned in the administration of justice. The statute was drawn by Mr. Buchanan, one of the Managers of the impeachment, who afterwards became president. It is doubtful, to say the least of it, whether any of the eminent lawyers in the Congress which adopted this provision, taken from a similar statute in Pennsylvania, had in mind anything more than to prevent the punishment, as for a contempt of exercises of the right of free speech and liberty of the press in criticising and denouncing judicial acts."

In

Cuyler v. At. & N. C. R. Co., 131 Fed. 95 (1904), a United States Judge appointed a receiver for the At. & North Carolina Railroad Company. Shortly thereafter and while the receiver, as an officer of the court was in charge of the railroad, Josephus Daniels published an editorial in his paper severally criticising the court for appointing the receiver, and on an order to show cause, it appeared that divers other editorials reflecting on the official integrity of the court had been published in the same paper. A writ of habeas corpus to release Mr. Daniels from arrest was presented to Circuit Judge Pritchard. Judge Pritchard's opinion is a careful examination of the statute and authorities. He quotes from Kent's Commentaries as follows:—

“That Act (1831) had withdrawn from the courts of the United States the common law power to protect their suitors, officers, witnesses and themselves against the libels of the press, however atrocious, and though published and circulated pending the very trial of the case.”

Continuing Judge Pritchard says:

“Under the judiciary Act of September 24, 1789, C. 20 § 17, Courts of the United States were given power to punish by fine or imprisonment at the discretion of the said court all contempts of authority in any cause or hearing before the same. The act of 1789 did not define or limit the power or authority of the Court of

the United States to inflict summary punishment in any cause or hearing before them. It was also silent as to any rules of procedure for determining what constituted contempt. As to what particular acts constituted contempt as well as the mode of procedure against the offender was to be determined in accordance with the established rules and principles of the common law with reference to existing conditions. Under this act, it was contended that the authority which the courts had to punish for contempt at their discretion had been greatly abused, and in order that the citizen might not be subjected to annoyance on account of the commission of acts not contemplated by the law, and that the freedom of the press, as well as the liberty of the individual might be preserved in the spirit guaranteed by the Constitution, Congress defined the limit to which the courts could go in such cases. Section 725 of the Revised Statutes is in the nature of a limitation of the power of the court to punish for contempt.”

Continuing the discussion of Section 725, and applying its provisions to the case then before him, Judge Pritchard said:

“The record does not show that the alleged misbehavior of the petitioner was in the presence of the court, or so near thereto as to obstruct the administration of justice. Nor is there anything to show that the alleged misbehavior of petitioner interfered with the court or that it tended, in the slightest degree to disturb the orderly proceedings of the court. The inherent power of the court to punish for con-

tempt is based upon the theory that it is essential that the court should possess ample authority to secure the free and unobstructed exercise of its functions in the enforcement of the law. Therefore, it is only such acts as tend to interfere with the orderly proceedings of the court or with the due administration of justice, that can be properly punished as a contempt of court. Words written or spoken at a place other than where the court is held and not so near thereto as to interfere with the proceeding of the court do not render the author liable. Any loud noise or other disturbance in the presence of the court or in the street or other place, so near thereto as to interfere with the orderly proceedings of the court would, undoubtedly, tend to obstruct the administration of justice, and under such circumstances, the court is empowered to summarily punish for contempt.”

Judge Pritchard points out what he conceives to be a limitation upon the broad language used by Judge Brown in *re May* where he said:

“The Act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trials.”

He states at page 99 that in his opinion “there may be instances where the publication of editorials or other matter in newspapers would bring the author within the limitations of the statute. For instance, if a newspaper editor should publish an article concerning a trial which was being considered by a jury, and should send a copy of the paper



containing such article to the jury or a member thereof during the progress of the trial for the purpose of influencing them in their deliberations, it would present a question whether such conduct would not be a misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice.”

And this language of Judge Pritchard suggests the thought that Congress in the use of the word “misbehavior” intended that the Act itself should possess inherently an element of wrong-doing. In the instant case, there is absent any purpose of doing wrong, and the court so finds. The article was published as an item of news without intention that the case on trial should, in any manner, be affected by it. The word “misbehavior” necessarily contemplates intentional wilfulness, and misconduct. If Congress did not intend this, and intended that any act obstructing the administration of justice, it would so declare, and the word “misbehavior” would not be used.

The term “misbehavior” carries with it the element of wrongful intention.

Smith vs. Cutler, 25 Am. Dec. 580.

See, likewise,

Hutton v. Superior Court of San Francisco,  
81 Pac. 409.

If misbehavior presupposes an intention to do wrong, then we submit the bare publication of the article in question as an item of news without any

intention that it should in any way interfere with the pending case does not constitute contempt and the judgment cannot stand.

In the case of

Kirk et al vs. U. S. ex rel Todd, U. S. Attorney, 192 Fed. 273,

this court considered many of the cases to which reference is made in this brief, but that case, as in all of the other cases where parties have been adjudged in contempt under this Act of Congress, the act or acts of misbehavior complained of had in them the element of wrongfulness. Newspapers are published to furnish to the public items of news. It is not contended that the facts set forth in the article in question are not true. If they were published with the intention that they should reach the jurors, so as to affect the case on trial, such conduct would constitute misconduct and have in it the element of misbehavior which the statute requires.

The record affirmatively shows the entire absence of any such intent.

We insist, however, that there is no warrant for adjudging Mr. Campbell in contempt. He had nothing to do with the preparation or publication of the article in question. The averment of the answer is, and it stands uncontradicted, that he didn't know anything about its publication. While the Independent Publishing Company may be responsible for Mr. Campbell's acts, Mr. Campbell is not responsible for what the company does, unless he participates, in some way, in the doing of the act,

and the record affirmatively shows that with the publication of the article or with the circulation of the paper containing it, he had nothing whatever to do.

The contempt in this case, if it exists at all, is a criminal one, and the compensatory fine should not be imposed.

In the case of

Gompers v. Buck Stove & Range Co., 221 U. S. 418,

the Supreme Court of the United States said that contempts were neither wholly civil, nor altogether criminal, and putting from its language in the case of

Bessette v. Conkey Co., 194 U. S. 329,  
said:

“It may not always be easy to classify a particular act as belonging to one of these two classes. It may partake of the characteristics of both.”

It then declares unqualifiedly that if the proceeding is for civil contempt, the punishment is remedial and for the benefit of the complainant, but if it is for a criminal contempt, the sentence is punitive to vindicate the authority of the court.

Gompers case, *supra*.

In *re Nevitt*, 117 Fed. 448, the distinction between the two classes of contempts is clearly and distinctly set forth as follows:

“Proceedings for contempts are of two classes;—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature and the government, the courts and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce.” (Citing cases).

The contempt here, if any, clearly is a criminal one, and the court erred in taking into consideration the costs which were incurred by the United States by reason of the continuance of the criminal case. As was stated by Judge Sanborn in the Nevitt case, *supra*:

“A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment.”

The appellants here weren't parties to the criminal prosecution, and the contempt, if any, committed by them was distinctively a criminal one, and the costs which were occasioned by the continuance



of the criminal case amounting to six hundred seventeen dollars ninety five cents, should not have been considered or included in the judgment.

The contempt treated as a criminal one is devoid of features of wrongfulness, so that the court would be justified in imposing only a nominal fine. Where the element of wrongdoing is wanting, the courts invariably feel satisfied with imposing a nominal fine and costs.

Merrimack River Sav. Bank v. Clay Center,  
219 U. S. 526;

State v. Fredlock, 94 Am. St. Rep. 932;

In re Duncan, 65 S. E. 210;

In re Robinson, 53 Am. St. Rep. 596;

In re Chartz, 124 Am. St. Rep. 915;

Mc Quade v. Emmons, 38 N. J. Law, 397;

Vol. 4 Pl. & Pr., page 791.

The principle, if such it might be properly termed, is stated in Cyc. vol. 9, page 57, as follows:

“Where a party is in contempt through a misapprehension of his duties, or where it results from a mistake, and a reasonable excuse is presented to the court, ordinarily the party will be discharged upon the payment of the costs and expenses of the proceeding.”

We respectfully submit that in this case, there is no warrant for adjudging Mr. Campbell in contempt. We, likewise, insist that the publication of the article, with the circumstances attendant upon

its publication, is not covered by the Act of Congress defining contempts, and that if it is within the Act referred to, it was wrongful for the court to include the costs incurred by reason of the continuance of the criminal case.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.



IN THE  
United States Circuit Court of Appeals  
FOR THE  
NINTH CIRCUIT.

In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING  
COMPANY, a corporation, and its  
manager and editor, WILL A.  
CAMPBELL,

*Plaintiffs in Error  
and Respondents.*

BRIEF OF UNITED STATES—DEFENDANT  
IN ERROR.

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BRIEF OF UNITED STATES—DEFENDANT  
IN ERROR.

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This is an appeal wherein the Independent Publishing Company, a corporation, and Will A. Campbell, its manager and editor, have appealed to this Court from a judgment rendered in the District Court of the United States for the District of Montana, adjudging them to be in contempt and fining the defendants in the sum of \$617.95 and the costs of the contempt proceeding.

The information filed in the lower court and the

answer of plaintiffs in error constitute the entire record upon which the lower court acted. Plaintiffs in error having admitted the publication of the article set forth in the information, although denying that any intent to commit a contempt existed, there are just two questions for the consideration of this court. They are:

Was the publication of the article itself a contempt under the circumstances?

Was the court justified in imposing the fine it did?

#### WAS THE PUBLICAITON A CONTEMPT?

Counsel for plaintiffs in error have presented in support of their contentions an able brief that contains a most excellent resume of the origin of contempt and the early law relating thereto. But we contend that in the present case they have gone far afield and by an argumentative construction, of their own, which they place upon the decisions they cite, have entirely lost sight of the vital question here. This question with which we are most concerned is, was the publication *misbehavior so near to the presence of the court as to obstruct the administration of justice?*

We contend that the great weight of authority is that a physical presence before the court is not at all necessary to vest the court with power to punish for a contempt nor is it at all necessary that the newspaper containing the article be circulated or sold in the court room or even in the corridors or

rooms adjacent thereto.

In the case of *United States vs. Carter*, 3 Cranch, C. C. 423, 25. Fed. Cases 15740, it was held that threats made to a witness on the piazza of the court house was a contempt in the presence of the court.

Judge Hammond, in passing upon a contempt, in the case of

*United States vs. Anon*, 21 Fed. 761, 768,

said as to a contempt being committed in the presence of the court:

“The mere place of occurrence may not be an absolute test of that question, and it may depend upon the character of the particular conduct in other respects besides the place where it happens. \* \* \* Wherever the conduct complained of ceases to be general in its effect, and invades the domain of the court, to become specific in its injury, by intimidating, or attempting to intimidate, with threats or otherwise, the court or its officers, the parties or their counsel, the witnesses, jurors, and the like, while in the discharge of their duties as such, if it be constructive because of the place where it happens, because of the direct injury it does in obstructing the workings of the organization for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad the terms may apparently be.”

Judge Hawley, in the case of *In re Brule*, 71 Fed. at page 947, 948, discusses, in a contempt case, the meaning of the phrase “or so near thereto as to



obstruct the administration of justice,” and after reviewing the cases, which he cites, says:

“Now, from the reasoning of these cases, it is made perfectly clear that the misbehavior of which Brule is guilty, if it had occurred anywhere within the building where the court is held, would have been ‘clearly a contempt, punishable as provided in section 725 of the Revised Statutes, by fine or imprisonment, at the discretion of the court, and without indictment.’ Why? Because, under such circumstances, it would have been misbehavior of a person in the presence of the court. But the statute says that the misbehavior of a person ‘so near thereto as to obstruct the administration of justice’ may be likewise punished as a contempt of court. If it is a contempt to bribe a witness in front of the courthouse door, is it not a contempt to attempt to do the same thing on the street opposite the court building, or four blocks away? Is not the result the same. Is not the motive of the accused the same? What difference does it make whether the attempt was made on the ground owned by the United States, or at the residence of the witness in the same town, four blocks, or about one-quarter of a mile away, from the court building? In one case the misbehavior would be construed to be in the presence of the court, and in the other ‘so near thereto as to obstruct the administration of justice,’ and the statute, in clear language, is made to apply to both cases.”

A most concise statement of the meaning of the phrase which we are now considering is to be found from this Circuit, in the case of

Kirk vs. United States, 192 Fed. 273,

wherein this court had occasion to pass upon this precise question. In the Kirk case, the alleged contempt was committed by attempting to bribe jurymen at a place distant nine blocks or 2700 feet from the Court House. We refrain from quoting excerpts from the opinion as your Honors are more familiar with it than we are. But suffice it to say that only one difference can be found between the case at bar and the Kirk case, that is, in the Kirk case the contempt consisted of an attempt to influence the verdict of jurors with money and in the case at bar the article published was in itself one that was well calculated to influence the minds of the jurors by presenting to them the sordid facts relating to the unfortunate defendant, Poe's, past life. Of course, the first is the most reprehensible thing that can be done for its effect strikes at the foundation of our judicial system, and while the second because of its nature is not so reprehensible nevertheless is a thing not to be tolerated for it would enable unscrupulous persons to wield a mighty weapon with which to thwart justice. No matter how guilty a man may be, he is always entitled to a fair trial and when any article is published that may tend to prejudice the minds of jurors then hearing the evidence of his guilt the same is an obstruction of justice within the meaning of the statute and within the jurisdiction of the court to punish summarily.

The Kirk case, *supra*, is cited with approval in the case of

United States vs. Toledo Newspaper Co., 220  
Fed. 458,

wherein the court had under consideration an alleged contempt of a newspaper and its editor for the publication of an article relating to a matter then pending in court. This seems to be the only case nearly resembling the case at bar that is reported from a Federal Court. The opinion is too lengthy to permit of sufficient quotations therefrom, hence we content ourselves with quoting from the syllabus:

“The constitutional guaranty of free speech and free press is not infringed by summary process and conviction in contempt, because of publications respecting a pending cause and tending to obstruct the administration of justice therein.”

“The act of March 2, 1831, (Rev. St. Par. 725; Judicial Code, Par. 286, Comp. St. 1913, Par. 1245,) declaratory of the law of contempt, was not intended to, nor does it, exempt publishers and editors from attachment for contempt for publications improperly affecting a pending case.”

“It is provided in section 268, Judicial Code, that this court may punish as contempt of its authority misbehavior so near its presence ‘as to obstruct the administration of justice.’ *Held*, that the criterion whether an alleged misbehavior is within this provision of the act is not the physical or topographical propinquity of the act to the court; but, having reference to all the pertinent circumstances attending its commission, it is the nature of the act as tend-

ing directly to affect the administration of justice.”

“Publications in a newspaper of general circulation in the city wherein the court sits, which publications are of a nature to embarrass the judge of the court in his consideration of a pending cause, or which tend to appeal to prejudice against the court or against a party to the cause respecting a pending case, may be misbehavior so near the presence of the court as to obstruct the administration of justice, wherefore they may subject the publisher or the editor, or both, to summary process in contempt under section 268, Judicial Code.”

“In order to produce a conviction, as contempt of court, for a newspaper publication affecting a pending cause, it is not necessary that the proof should show either that the publication ever came to the attention of the judge of the court, or that it had any influence on the consideration of the cause to which it refers. It is sufficient if, excluding any other reasonable interpretation of the language of the publication, after applying the ordinary rules for construing the English language and considering how it may be reasonably understood by ordinary readers, the state of public feeling on the subject-matter of the publication, and any other relevant matter which may reasonably aid in understanding the necessary effect of such publication respecting the pending cause, it is seen to tend to obstruct the administration of justice therein.”

The opinion rendered by Judge Bourquin in the case at bar is to be found in the transcript herein, pages 17 to 22 both inclusive. This opinion contains the views of the District Court of the United States for the District of Montana, and inasmuch as the



citations therein contained will be read by the Court on this appeal we will not repeat the same here.

As to the meaning of the words “misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice” (Sec. 268 Judicial Code U. S.) see also:

Savin’s Case, 131 U. S. 267, 275.

Coming to the question of the intent which plaintiffs in error claim is lacking in the case at bar. First we respectfully refer to those cases cited by Judge Bourquin in his decision which are to be found on pages 20, 21, 22. They are

Ellis vs. U. S., 206 U. S. 257;

Newspaper Co. vs. Commonwealth, 188 Mass. 449, 74 N. E. 682;

Patterson’s Case, 205 U. S. 462;

Newspaper Co. vs. Commonwealth, 172 Mass. 292, 52 N. E. 445.

In addition to the cases just cited we cite

State vs. Howell, 80 Conn. 668; 13 Ann Cases 501, and footnote on pages 503 and 504, in 13 Ann. Cases,

where in the rule is stated to be that where a newspaper publication makes a direct charge against the court which admits of but one fair and reasonable construction, and requires no innuendo

to apply the meaning to the court, the disavowal of an intent to commit a contempt is not available as a defense, although such disavowal may serve to extenuate the offense.

The contention of plaintiffs in error that it is necessary that the publication should have been made with the intention that it should reach the jurors so as to affect the case on trial, is likewise untenable as the slightest reading of the cases cited *supra* will show.

So in this case we have the publication of an article in a newspaper managed by one of the contemnors and owned by the other, that of its very nature was such that when read by any or all of the jurors then impaneled to try the case on trial would in itself tend to create bias or prejudice against the defendant. This bias or prejudice would most naturally be derived by reason of the fact that the article set forth a criminal record of the defendant Poe that in no proper way could have been brought to the attention of the jury unless Poe himself had cast his good reputation into the balance. Had the article appeared in the newspaper prior to the impaneling of the jury, it would not have been as detrimental to him as it was in the present case for the reason that Poe's attorney could have questioned the jury on its *voir dire* as to whether or not any of them had read the article and from it formed or expressed an opinion. If such an examination on the *voir dire* had disclosed any or all of the jury men to be in possession of an opinion, formed

from the article, challenge for cause would have been sustained. The defendant Poe would have been further protected from the fact that he could have exercised some or all of his peremptory challenges to rid himself of persons on the jury whom he might have cared to peremptorily challenged. But the article appearing after the case had started and the defendant thus rendered powerless to protect his interests by an examination of the jury men and exercise of the challenges above indicated, the article itself interfered with the due administration of justice so near to the presence of the court as to obstruct it. The newspaper was shown to have been published and circulated in the city where the trial was then being had and was read by some of the jury men, and it can hardly be said that courts need submit to the publication of such articles in newspapers published and circulated as the one in this case was and be powerless to punish the persons responsible therefor, unless the newspaper should have been deliberately given to members of the jury with the intention to influence them or sold in the court room itself.

The cases we have heretofore cited clearly point out the meaning of the words in the statute and we submit that the reasoning therein contained is applicable to this case, and the judgment appealed from by plaintiffs in error should be affirmed.

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## WAS THE COURT JUSTIFIED IN IMPOS- ING THE FINE IT DID?

We agree with counsel for plaintiffs in error when they state this is a criminal contempt.

(Brief of Plaintiffs in Error page 38).

As to the matter of the lower court's taking into consideration the costs of the case against Poe, we submit that this being a criminal contempt the court had a right to impose such punishment, either by way of fine or imprisonment, as in its discretion it saw fit. The statute expressly gives this power to Federal Courts.

### Section 268 Judicial Code of U. S.

The lower court in imposing the fine merely stated in its opinion that in justice the punishment should be at least the amount of damage suffered by the United States because of the continuance of the Poe case.

### Transcript page 22.

This was done because in his discretion the Judge felt that it would be a safe guide to him in arriving at a sum which he felt would adequately punish the contemnors not as a compensatory amount but as a punishment for the violation of the court's privilege to have all matters pending before it proceed to a conclusion without the extraneous influence that might flow from such articles in newspapers as the



one in question.

The adjudging of Mr. Campbell in contempt was warranted under the law and has found sanction heretofore.

See:

U. S. vs. Toledo Newspaper Co., 220 Fed.  
458.

In conclusion we respectfully submit that the judgment appealed from should be affirmed.

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